venting the shipment of liquor into dry territory; to the Committee on the Judiciary.

Also, petition of Milton S. Florsheim, Chicago, Ill., favoring the passage of legislation to publish all hearings under the Sherman antitrust law; to the Committee on Interstate and Foreign Commerce.

By Mr. GARNER: Petition of citizens of Mathis, Tex., favoring the passage of the Kenyon-Sheppard bill, prohibiting the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. HARDWICK: Petition of the Sibley Manufacturing Co., Augusta, Ga., and A. Klipstein & Co., New York, both favoring legislation placing zinc dust on the free list; to the Committee on Ways and Means.

By Mr HARTMAN: Petition of the Department of Internal Affairs, Bureau of Standards, Harrisburg, Pa, favoring the passage of House bill 23113, fixing a standard barrel for fruits, vegetables, etc.; to the Committee on Ways and Means.

By Mr. HAYES: Petition of Corlin H. McIsaac, Santa Cruz, Cal.; David Starr Jordan, Stanford University, Cal.; R. W. Putnam, San Luis Obispo, Cal.; and Edwin Duryea, jr., San Francisco, Cal., all favoring the passage of House bill 22589, for the construction of consular and diplomatic buildings at Mexico City, Tokyo, Berne, and Hankow; to the Committee on Foreign Affairs.

Also, petition of S. J. Mayock, Gilroy, Cal., protesting against the passage of the Kenyon-Sheppard bill preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

Also, petition of W. P. Fuller & Co., San Francisco, Cal., favoring the passage of House bill 25106, for the incorporation of the Chamber of Commerce of the United States of America under a Federal charter; to the Committee on the Judiciary.

Also, petition of the San Francisco District (California) Federation of Women's Clubs, favoring the passage of legislation for the retention of the name of Yerba Buena Island instead of Goat Island; to the Committee on the Territories.

Also, petition of the Political Equality Club, San Jose, Cal., favoring the passage of legislation for the recognition of the Chinese Republic; to the Committee on Foreign Affairs.

Also, petition of Frederick J. Koster, San Francisco, Cal., favoring the passage of Senate bill 4043, preventing the shipment of liquor into dry territory; to the Committee on the Judiciary.

By Mr. LINDSAY: Petition of Harrison Clark, passed department commander State of New York Grand Army of the Republic, favoring the passage of House bill 1339, granting increase of pension to veterans who lost a limb in the Civil War; to the Committee on Invalid Pensions.

By Mr. MARTIN of South Dakota: Petition of citizens of Lincoln, Nebr., favoring the passage of legislation giving a national ownership and control of all public telephone and telegraph wires; to the Committee on Interstate and Foreign Commerce.

By Mr. MOON of Tennessee: Petition of railroad men of Tennessee, protesting against the passage of House bill 5382, the Brantley workmen's compensation bill; to the Committee on the Judiciary.

By Mr. SMITH of New York: Petition of Buffalo Historical Society, Buffalo, N. Y., favoring the passage of legislation for the erection of a proper national archives building at Washington, D. C.; to the Committee on Public Buildings and Grounds.

By Mr. TILSON: Petition of the Warner Bros. Co., Bridgeport, Conn., protesting against the passage of section 2 of the Oldfield patent bill, preventing the manufacturers from fixing the prices on patent goods; to the Committee on Patents.

SENATE.

THURSDAY, *January 9, 1913.*

Prayer by the Chaplain, Rev. Ulysses G. B. Pierce, D. D.

Mr. BACON took the chair as President pro tempore under the previous order of the Senate.

The Secretary proceeded to read the Journal of yesterday's proceedings, when, on request of Mr. GALLINGER and by unanimous consent, the further reading was dispensed with and the Journal was approved.

LOANS IN THE DISTRICT OF COLUMBIA.

Mr. CURTIS. I present a conference report on the disagreeing votes of the two Houses upon the bill (H. R. 8768) to regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia. (S. Doc. No. 998.)

Mr. CRAWFORD. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The Senator from South Dakota suggests the absence of a quorum. The Secretary will call the roll.

The Secretary called the roll, and the following Senators answered to their names:

Ashurst	Crane	Kern	Sanders
Bacon	Crawford	Lodge	Shively
Borah	Cullom	McLean	Simmons
Bourne	Curtis	Martin, Va.	Smith, Ariz.
Bradley	Dillingham	Martine, N. J.	Smoot
Brandegee	Dixon	Nelson	Sutherland
Bristow	du Pont	Newlands	Swanson
Brown	Fletcher	Oliver	Thornton
Bryan	Foster	Page	Tillman
Burnham	Gallinger	Perkins	Townsend
Burton	Gronna	Perky	Warren
Catron	Hitchcock	Poindexter	Wetmore
Chamberlain	Johnson, Me.	Reed	Williams
Clapp	Jones	Richardson	Works
Clark, Wyo.	Kenyon	Root	

Mr. CLAPP (when Mr. LA FOLLETTE's name was called). The senior Senator from Wisconsin [Mr. LA FOLLETTE] is necessarily detained from the Chamber on committee work.

Mr. CLAPP (when Mr. MCCUMBER's name was called). The senior Senator from North Dakota [Mr. MCCUMBER] is necessarily detained from the Chamber on committee work.

Mr. MARTIN of Virginia (when Mr. O'GORMAN's name was called). The junior Senator from New York [Mr. O'GORMAN] is detained from the Senate on official business in connection with Senate work.

Mr. SIMMONS. I desire to announce that my colleague [Mr. OVERMAN] is absent on account of sickness.

Mr. TOWNSEND. The senior Senator from Michigan [Mr. SMITH] is absent on business of the Senate. I will let this announcement stand for the day.

Mr. KERN. I again announce the unavoidable absence of the junior Senator from South Carolina [Mr. SMITH] on account of a death in his family.

The PRESIDENT pro tempore. On the call of the roll of the Senate 59 Senators have responded to their names. A quorum of the Senate is present.

Mr. CURTIS. I call for the reading of the conference report.

The PRESIDENT pro tempore. The Secretary will read the report.

Mr. TOWNSEND. As I understand it, this is a conference report on the so-called loan-shark bill, which has been before the Senate for some time.

The PRESIDENT pro tempore. It has not yet been laid before the Senate.

Mr. TOWNSEND. I will wait.

Mr. REED. As a matter of inquiry, does this take precedence of the order of morning business?

The PRESIDENT pro tempore. The rule of the Senate is that a conference report is always in order, except while the Journal is being read, while the Senate is dividing, and one or two other exceptions. It is in order now.

Mr. REED. Will the Senator from Kansas yield long enough to permit the introduction of a bill?

The PRESIDENT pro tempore. That order has not yet been reached. There are several other orders before the introduction of bills.

Mr. REED. I understand, then, that that order will come, but I thought the Senator from Kansas intended to call up a matter for discussion.

Mr. CURTIS. It will take no time, I will state to the Senator from Missouri.

Mr. REED. Very well.

The PRESIDENT pro tempore. The report will be read.

The Secretary read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 8768) to regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 1, 3, 6, 7, 8, 9, 10, 11, and 12.

That the House recede from its disagreement to the amendments of the Senate numbered 2, 4, and 5, and agree to the same.

That the Senate recede from its amendment to the title of the bill.

CHARLES CURTIS,
WILLIAM P. DILLINGHAM,
T. H. PAYNTER,
Managers on the part of the Senate.
BEN JOHNSON,
J. A. M. ADAIR,
L. C. DYER,
Managers on the part of the House.

Mr. TOWNSEND. Mr. President, I ask that the conference report be printed and lie over until to-morrow.

Mr. CURTIS. I have no objection to that order, but give notice that immediately after the routine morning business to-morrow I will call up the conference report for action.

The PRESIDENT pro tempore. Under the suggestion of the Senator from Kansas, without objection, the report will be printed and lie over until to-morrow.

SENATOR FROM ARKANSAS.

Mr. WILLIAMS. Mr. President, I present the credentials of the appointment of Mr. J. N. HEISKELL as a Senator from the State of Arkansas.

The PRESIDENT pro tempore. The credentials will be read.

The credentials of J. N. HEISKELL, appointed by the governor of the State of Arkansas a Senator from that State to fill the vacancy in the term ending March 3, 1913, occasioned by the death of Senator JEFF DAVIS, were read and ordered to be filed.

Mr. WILLIAMS. The Senator appointed is present, and I ask that the oath be administered to him.

The PRESIDENT pro tempore. The Senator appointed will present himself at the desk to take the oath of office.

Mr. HEISKELL was escorted to the Vice President's desk by Mr. WILLIAMS, and the oath prescribed by law having been administered to him, he took his seat in the Senate.

REPORT OF ECONOMY AND EFFICIENCY COMMISSION (H. DOC. NO. 1252).

The PRESIDENT pro tempore laid before the Senate a message from the President of the United States, which was read, and, with the accompanying papers and illustrations, ordered to lie on the table and be printed.

(See House proceedings of January 8, 1913.)

FUR SEALS (S. DOC. NO. 997).

The PRESIDENT pro tempore laid before the Senate a message from the President of the United States, which was read and referred to the Committee on Foreign Relations and ordered to be printed.

(See House proceedings of January 8, 1913.)

ELECTORS FOR PRESIDENT AND VICE PRESIDENT.

The PRESIDENT pro tempore laid before the Senate communications from the Secretary of State, transmitting, pursuant to law, authentic copies of the certificate of ascertainment of electors for President and Vice President appointed in the States of Missouri and Pennsylvania at the elections held in those States November 5, 1912, which were ordered to be filed.

INTERSTATE SHIPMENT OF LIQUORS.

Mr. SANDERS. Mr. President——

The PRESIDING OFFICER (Mr. BRANDEGEE in the chair). Petitions and memorials are in order. The Senator from Tennessee.

Mr. SANDERS. Mr. President, last Monday I asked unanimous consent that the bill to prohibit interstate commerce in intoxicating liquors be taken up next Monday. Objection was made on account of the fact that the impeachment trial would take up most of this week and that there would not be time for discussion of the measure. Then on Tuesday I made the same request, making the date one week later, which would be January 20. It was proposed that it should not interfere with appropriation bills. It was also suggested that at that particular time there were not enough Senators in the Chamber to give the request proper consideration.

I now make the same request, with the proviso that it is not to interfere with appropriation bills. I wish to say in this connection that since I brought the matter up on last Tuesday we have been able to determine about when the impeachment trial will be concluded, and that this request, if granted, will still leave one week for a discussion of this bill after the conclusion of the impeachment trial. I therefore send to the desk, Mr. President, the following request.

The PRESIDING OFFICER. The Senator from Tennessee asks unanimous consent for the consideration of the following order, which will be reported by the Secretary.

Mr. REED. Mr. President——

Mr. LODGE. Let it be read. Senators ask that it be read.

Mr. REED. Under what order are we proceeding?

The PRESIDING OFFICER. We are proceeding under the order of petitions and memorials; but the Chair understands that the Senator from Tennessee is requesting unanimous consent——

Mr. REED. Is that in order at this time?

The PRESIDING OFFICER. The Chair thinks it is in order, by unanimous consent, but that it could not be put, out of order, in the event of a single objection.

Mr. REED. The time of the Senate has been consumed this morning by the reading of messages from the President of the United States, and there are some bills that I want to introduce and I think that this request is not in order at this time. I think the only thing that is in order at this time is the presentation of petitions and memorials.

Mr. SANDERS. I understand it is in order.

The PRESIDING OFFICER. The Chair would rule that it is in order for a Senator to ask unanimous consent for the consideration of any matter.

Mr. LODGE. I suppose a request for unanimous consent is equivalent to asking for an order of the Senate, and it would come in under the last order of business—the morning hour—would it not? It would come in legitimately and could not be kept out by a single objection.

The PRESIDING OFFICER. The ruling of the Chair was that unanimous consent could be asked at any time.

Mr. LODGE. That is possible at any time, I agree, but it would be in order at this time regularly under the last order of morning business.

Mr. SANDERS. I ask that this order be read and that unanimous consent be given to place it before the body.

The PRESIDING OFFICER. The Secretary will read the proposed order presented by the Senator from Tennessee.

Mr. REED. Mr. President, I rise to a point of order that the request itself at this time is not in order.

The PRESIDING OFFICER. In the opinion of the Chair the point of order is not well taken.

Mr. REED. To state my point, under this order of business you can no more ask unanimous consent to take up a particular bill than you can do any other thing which does not come under the head of the presentation of petitions and memorials. This is not a petition or a memorial. The Senator could ask unanimous consent to set aside the order of business, but that is not what he is asking. He is asking unanimous consent for the consideration of a bill at a particular time.

Mr. SANDERS. Mr. President, I rise to a point of order.

The PRESIDING OFFICER. The Senator from Missouri has the floor and is speaking to a point of order.

Mr. SANDERS. My point of order is that the Chair has already ruled.

The PRESIDING OFFICER. The Chair had ruled. The Secretary will report the request.

Mr. REED. Mr. President, I object.

The PRESIDING OFFICER. Objection is made to the consent asked for by the Senator from Tennessee. Are there further——

Mr. MARTINE of New Jersey. I desire to present certain petitions.

Mr. NELSON. We have a right to hear the request read, because we have a right to determine whether the objection is good or not.

The PRESIDING OFFICER. The Secretary was about to report the request, which was verbally stated by the Senator from Tennessee. If there is demand for it, the Secretary will report the request that is made in writing.

The Secretary read as follows:

It is agreed by unanimous consent that on Monday, January 20, at 3 o'clock p. m., the bill (S. 4043) to prohibit interstate commerce in intoxicating liquors be taken up for consideration, not to interfere with appropriation bills, and that the vote be taken on all amendments pending and amendments to be offered, and upon the bill itself, not later than the hour of 6 o'clock on that day.

The PRESIDING OFFICER. Objection is made.

PETITIONS AND MEMORIALS.

Mr. GALLINGER presented a petition of Starr King Chapter, No. 32, Order of Eastern Star, of Berlin, N. H., praying that an appropriation be made for the erection of a public building in that city, which was referred to the Committee on Public Buildings and Grounds.

He also presented a petition of the Woman's Christian Temperance Union of Berlin, N. H., praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which was ordered to lie on the table.

Mr. McLEAN presented a memorial of members of the German-American Alliance of Bridgeport, Conn., remonstrating against the passage of the so-called Kenyon-Sheppard interstate liquor bill, which was ordered to lie on the table.

Mr. MARTINE of New Jersey presented a petition of the congregation of the First Presbyterian Church of Hamilton Square, N. J., praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which was ordered to lie on the table.

Mr. LODGE presented a petition of sundry citizens of Stoneham, Mass., praying for the passage of the so-called Kenyon-Sheppard interstate liquor bill, which was ordered to lie on the table.

REPORTS OF COMMITTEES.

Mr. WARREN, from the Committee on Military Affairs, to which was referred the bill (S. 7515) for the relief of Col. Richard H. Wilson, Fourteenth Infantry, United States Army, reported it with an amendment and submitted a report (No. 1087) thereon.

Mr. SMOOT, from the Committee on Public Lands, to which was referred the bill (S. 7638) to provide for State selections on phosphate and oil lands, reported it with amendments and submitted a report (No. 1088) thereon.

Mr. JONES, from the Committee on Public Lands, to which were referred the following bills, reported them each without amendment and submitted reports thereon:

S. 5377. A bill releasing the claim of the United States Government to lot No. 306, in the old city of Pensacola (S. Rept. 1090); and

S. 5378. A bill releasing the claim of the United States Government to that portion of land, being a fractional block, bounded on the north and east by Bayou Cadet, on the west by Cevallos Street, and on the south by Intendencia Street, in the old city of Pensacola (S. Rept. 1089).

Mr. CURTIS, from the Committee on Pensions, to which was referred the bill (H. R. 27062) granting pensions and increase of pensions to certain soldiers and sailors of the Civil War and certain widows and dependent children of soldiers and sailors of said war, reported it with amendments and submitted a report (No. 1091) thereon.

He also, from the same committee, to which were referred certain bills granting pensions and increase of pensions, submitted a report (No. 1092) accompanied by a bill (S. 8034) granting pensions and increase of pensions to certain soldiers and sailors of the Civil War and certain widows and dependent relatives of such soldiers and sailors, which was read twice by its title, the bill being a substitute for the following Senate bills heretofore referred to that committee.

S. 33. Ellen B. Kittredge.
S. 300. Thomas W. Dickey.
S. 437. Mary E. McDermott.
S. 921. Henry Frink.
S. 1115. Christian C. Bradymeyer.
S. 1223. George M. Pierce.
S. 2106. Joseph C. Trickey.
S. 2293. James M. Kinnaman.
S. 2379. Addie Roof.
S. 2490. Leeman Underhill.
S. 2563. Charles W. Morgan.
S. 2634. Alphonso L. Stasy.
S. 2948. Jeremiah Lushbough.
S. 3178. James B. Sales.
S. 3304. Mary E. Rikard.
S. 3370. Margaret H. Benjamin.
S. 3490. Benjamin F. Ferris.
S. 3522. Hiram Ferrier.
S. 3573. Henry B. Leach.
S. 3597. John Bell.
S. 3665. Elizabeth Lile.
S. 3666. George M. Conner.
S. 3673. Lola B. Hendershott and Louise Hendershott.
S. 3748. Daniel H. Grove.
S. 3993. Charlotte R. Coe.
S. 4123. Caroline M. Packard.
S. 4255. Benjamin C. Smith.
S. 4656. George R. Griffith.
S. 4802. Rolly Wright.
S. 4819. Charles J. Higgins.
S. 4989. Joseph Letzkus.
S. 5033. Israel H. Phillips.
S. 5136. John E. Woodward.
S. 5171. Josephine A. Davis.
S. 5329. Osmer C. Coleman.
S. 5339. Hugh McLaughlin.
S. 5514. Joseph Striker.
S. 5528. Mary Glancey.
S. 5562. Joby A. Howland.
S. 5657. Andrew King.
S. 5852. Mary S. Hull.
S. 6012. Sarah E. Haskins.
S. 6169. Ira Waldo.
S. 6270. Ellis C. Howe.
S. 6452. Thomas M. Dixon and Joanna L. Dixon.
S. 6606. Solomon Wilburn.
S. 6651. William O. Sutherland.
S. 6664. Annie H. Ross.
S. 6739. John Dixon.
S. 6750. Arnold Bloom.
S. 6759. John D. Perkins.
S. 6787. William Harrison.
S. 6791. Sarah E. Johnson.
S. 6873. Willis Dobson.
S. 6878. Zachariah T. Fortner.
S. 6931. Jesse A. Moore.
S. 6938. James Moynahan.
S. 6955. Dustin Berrow.
S. 6966. Sarah J. Viall.
S. 6968. James Luther Justice.
S. 6973. Mary A. Crocker.
S. 7000. Winfield S. McGowan.
S. 7025. Martha J. Stephenson.
S. 7047. George E. Smith.
S. 7076. Roscoe B. Smith.
S. 7084. Mate Fulkerson.
S. 7100. Fred D. Bryan.
S. 7108. Ada M. Wade.
S. 7136. Charlotte M. Snowball.
S. 7137. Albert White.
S. 7164. William W. Lane.
S. 7173. Lydia M. Jacobs.
S. 7190. Albert Burgess.
S. 7200. Rosa L. Couch.
S. 7214. John Cook, alias Joseph Moore.
S. 7215. Amanda Barrett.
S. 7216. Alvah S. Howes.
S. 7219. George C. Rider.
S. 7224. Charles C. Littlefield.
S. 7276. Martha Dye.
S. 7282. Carrie Hitchcock.
S. 7363. Sarah McLaury.
S. 7376. William H. Frederick.
S. 7460. Joseph D. Iler.
S. 7510. Rodney S. Vaughan.
S. 7526. Isaac A. Sharp.
S. 7529. Turner S. Bailey.
S. 7547. Alpheus K. Rodgers.
S. 7556. Christina Higgins.
S. 7557. Josiah B. Hall.
S. 7569. Ellen Tyson.
S. 7581. William Hoover.
S. 7587. Abby E. Carpenter.
S. 7588. Sarah Gross.
S. 7595. Nelson Taylor.
S. 7596. Carrie Crockett.
S. 7615. Lucy H. Collins.
S. 7624. Royal H. Stevens.
S. 7628. Araminta G. Sargent.
S. 7661. Sidney P. Jones.
S. 7664. Ann T. Smith.
S. 7677. Ellen E. Clark.
S. 7701. Sarah B. Paden.
S. 7717. Edmund P. Banning.
S. 7719. Winchester E. Moore.
S. 7730. Mary P. Pierce.
S. 7775. John B. Ladeau.
S. 7781. Christopher P. Brown.
S. 7791. Allen Price.
S. 7805. Delphine R. Burritt.

He also, from the same committee, to which were referred certain bills granting pensions and increase of pensions, submitted a report (No. 1093) accompanied by a bill (S. 8035) granting pensions and increase of pensions to certain soldiers and sailors of the Regular Army and Navy and of wars other than the Civil War, and to certain widows and dependent relatives of such soldiers and sailors, which was read twice by its

title, the bill being a substitute for the following Senate bills heretofore referred to that committee:

S. 1915. Caroline M. Anthony.
S. 2465. Arthur F. Shepherd.
S. 3615. Walter L. Donahue.
S. 3726. Calvin R. Lockhart.
S. 3920. Albert J. Wallace.
S. 4691. Thomas M. F. Delaney.
S. 6091. Joseph Hurd.
S. 6101. John D. Sullivan.
S. 6107. Mary E. Maher.
S. 6193. George W. James.
S. 6276. George G. Thirlby.
S. 6764. Lansing B. Nichols.
S. 6883. Jacob Korby.
S. 6898. John J. Ledford.
S. 6921. Deborah H. Riggs.
S. 6998. Elmer E. Rose.
S. 7021. Cyrenius Mulkey.
S. 7032. Patrick J. Whelan.
S. 7036. John F. Burton.
S. 7065. Ephraim W. Baughman.
S. 7135. James J. Blevans.
S. 7281. Henry H. Woodward.
S. 7305. Bertie L. Wade.
S. 7328. Charlotte R. Wynne.
S. 7368. Otto Weber.
S. 7466. Carl W. Carlson.

THE JUDICIAL CODE.

Mr. SMOOT. I am directed by the Committee on Printing, to which was referred Senate concurrent resolution 34, for the printing of 25,000 copies of the Judicial Code, to report it with amendments, and I ask unanimous consent for its present consideration.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the concurrent resolution.

The amendments were, in line 2, before the word "thousand," to strike out "twenty-five" and insert "thirty," and at the end of the resolution to insert the words "and 5,000 copies for the use of the Senate document room."

The amendments were agreed to.

The concurrent resolution as amended was agreed to, as follows:

Resolved by the Senate (the House of Representatives concurring), That there be printed 30,000 copies of the Judicial Code of the United States, prepared under the direction of the Judiciary Committee of the Senate, 10,000 copies of which shall be for the use of the Senate and 15,000 copies for the use of the House of Representatives, and 5,000 copies for the use of the Senate document room.

BILLS AND JOINT RESOLUTIONS INTRODUCED.

Bills and joint resolutions were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. CHAMBERLAIN:

A bill (S. 8036) granting an increase of pension to George S. Pauer; to the Committee on Pensions.

By Mr. KERN:

A bill (S. 8037) for the relief of Israel Sturges; and

A bill (S. 8038) for the relief of James M. Blankenship (with accompanying papers); to the Committee on Military Affairs.

A bill (S. 8039) granting a pension to Delia E. Godfrey (with accompanying papers); to the Committee on Pensions.

By Mr. JONES:

A bill (S. 8040) for the relief of the Pacific Creosoting Co.; to the Committee on Claims.

By Mr. OWEN:

A bill (S. 8041) granting a pension to Seberon J. M. Cox (with accompanying papers); and

A bill (S. 8042) granting an increase of pension to Samuel L. Hess (with accompanying papers); to the Committee on Pensions.

By Mr. McLEAN:

A bill (S. 8043) granting an increase of pension to Mary E. Beach (with accompanying papers); and

A bill (S. 8044) granting an increase of pension to John McCarthy (with accompanying papers); to the Committee on Pensions.

By Mr. ASHURST:

A bill (S. 8045) opening the surplus and unallotted lands in the Colorado River Indian Reservation to settlement under the provisions of the Carey land acts, and for other purposes; to the Committe on Indian Affairs.

By Mr. BURNHAM:

A bill (S. 8046) granting a pension to Anna Kennedy; to the Committee on Pensions.

By Mr. ROOT:

A bill (S. 8047) to enable the Secretary of War to pay the amount awarded to the Malambo fire claimants by the joint commission under article 6 of the treaty of November 18, 1903, between the United States and Panama; to the Committee on Appropriations.

A bill (S. 8048) to provide for the purchase of a site and the erection of a public building thereon at Walden, N. Y.; to the Committee on Public Buildings and Grounds.

By Mr. OLIVER:

A bill (S. 8049) granting an increase of pension to Harvey T. Smith (with accompanying papers); to the Committee on Pensions.

By Mr. WILLIAMS:

A bill (S. 8050) to carry into effect the findings of the Court of Claims in the matter of the claim of Elizabeth Johnson; to the Committee on Claims.

A bill (S. 8051) authorizing the Secretary of War, in his discretion, to deliver to the town of Washington, in the State of Mississippi, for the use of Jefferson College, one condemned cannon, with its carriage and outfit of cannon balls; and

A bill (S. 8052) authorizing the Secretary of War, in his discretion, to deliver to the city of Corinth, in the State of Mississippi, one condemned cannon, with its carriage and outfit of cannon balls; to the Committee on Military Affairs.

By Mr. REED:

A bill (S. 8053) to authorize the creation of a temporary commission to investigate and make recommendation as to the necessity or desirability of establishing a national aerodynamical laboratory, and prescribing the duties of said commission, and providing for the expenses thereof; to the Committee on Naval Affairs.

A bill (S. 8054) to provide for the enlargement, extension, remodeling, and improvement of the post-office building at Moberly, Mo., and for other purposes; to the Committee on Public Buildings and Grounds.

By Mr. MARTINE of New Jersey:

A bill (S. 8055) granting a pension to Gilbert J. Jackson (with accompanying papers); and

A bill (S. 8056) granting a pension to John J. Miller (with accompanying papers); to the Committee on Pensions.

By Mr. CRAWFORD:

A bill (S. 8057) regulating the issuance of interlocutory injunctions restraining the enforcement of orders made by the Interstate Commerce Commission, and orders made by administrative boards or commissions created by and acting under the statutes of a State; to the Committee on the Judiciary.

By Mr. OWEN:

A joint resolution (S. J. Res. 149) extending the time for the survey, classification, and appraisement of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations in Oklahoma (with accompanying paper); to the Committee on Indian Affairs.

By Mr. WARREN:

A joint resolution (S. J. Res. 150) appropriating $40,000 for expenses of inquiries and investigations ordered by the Senate; to the Committee on Appropriations.

By Mr. MARTIN of Virginia:

A joint resolution (S. J. Res. 151) authorizing the Librarian of Congress to return to Williamsburg Lodge, No. 6, A. F. and A. M., of Virginia, the original manuscript of the record of the proceedings of said lodge; to the Committee on the Library.

SECOND PAN AMERICAN SCIENTIFIC CONGRESS.

Mr. ROOT submitted an amendment proposing to appropriate $50,000 to enable the Government of the United States to participate in the second Pan American Scientific Congress, to be held in Washington, D. C., October, 1914, intended to be proposed by him to the diplomatic and consular appropriation bill, which was referred to the Committee on Appropriations and ordered to be printed.

OMNIBUS CLAIMS BILL.

The PRESIDING OFFICER. The hour of 1 o'clock having arrived——

Mr. CRAWFORD. I desire to give notice that I shall ask the Senate to resume the consideration of the omnibus claims bill at the close of the morning business to-morrow.

Mr. WILLIAMS and Mr. REED addressed the Chair.

The PRESIDING OFFICER. The Chair is compelled to carry out the order of the Senate, which is that at 1 o'clock it will reconvene as a Court of Impeachment.

IMPEACHMENT OF ROBERT W. ARCHBALD.

The PRESIDENT pro tempore (Mr. BACON) took the chair and announced that the time had arrived for the consideration of the articles of impeachment against Robert W. Archbald.

The respondent appeared with his counsel, Mr. Worthington, Mr. Simpson, Mr. Robert W. Archbald, jr., and Mr. Martin.

The managers on the part of the House of Representatives appeared in the seats provided for them.

The PRESIDENT pro tempore. The Sergeant at Arms will make proclamation.

The Sergeant at Arms made the usual proclamation.

The PRESIDENT pro tempore. The Secretary will read the Journal of the last sitting of the Senate for the consideration of the articles of impeachment.

The Secretary read the Journal of the proceedings of the Senate of Wednesday, January 8, 1913, when sitting as a court.

The PRESIDENT pro tempore. Are there any inaccuracies in the Journal? If not, it will stand approved. Mr. Manager HOWLAND has the floor.

Mr. Manager HOWLAND resumed and concluded the speech begun by him yesterday. The entire speech is as follows:

ARGUMENT OF MR. HOWLAND, ONE OF THE MANAGERS ON THE PART OF THE HOUSE.

Mr. Manager HOWLAND. Mr. President, I shall proceed immediately to submit for the consideration of the Senate certain propositions of law. The questions of fact will be discussed by my colleagues.

The managers contend that the power to impeach is properly invoked to remove a Federal judge whenever, by reason of misbehavior, misconduct, malconduct, or maladministration, the judge has demonstrated his unfitness to continue in office; that misbehavior on the part of a Federal judge is a violation of the Constitution, which is the supreme law of the land, and a violation also of his oath of office taken in compliance with the requirements of the statute law. If the Senate should adopt this view of the law, then the only question to be passed on by the Senate would be whether the acts alleged and proven constitute such misbehavior as to render the respondent unfit to continue in office.

In supporting our view of the law I shall *first* call attention to the issue of law directly raised by the pleadings; *second*, to the proper construction to be placed upon certain sections of the Constitution; and, *third*, to the precedents, both State and Federal.

The respondent, in answer to each one of the articles of impeachment filed against him in paragraph 1 thereof, uses the following language:

> That the said article does not set forth anything which, if true, constitutes an impeachable offense or a high crime or misdemeanor as defined in the Constitution of the United States, and that, therefore, the Senate sitting as a Court of Impeachment should not further entertain the charge contained in said article.

It will be noticed that in the first paragraph of his several answers to the various counts the respondent has really interposed what may properly be designated as a general demurrer to each and every article presented against him, and that by paragraph 2 of the answer to each article the respondent pleads by way of confession and avoidance, substantially admitting the acts charged and attempting to avoid by denying wrongful intent.

The replication interposed by the managers is a joinder in demurrer and a traverse of the new matter in the plea, so that the record in this case produces an issue of law and an issue of fact to be passed upon by the Senate at the same time. I can only account for this condition of affairs by presuming that counsel for the respondent had very little confidence in the issue of law raised by his general demurrer and therefore did not dare press it for decision before going to trial on the merits.

In the consideration of this case, if the Senate should decide that the demurrer interposed by the respondent ought to be sustained, that would terminate the inquiry, and it would, of course, be unnecessary to pass upon the issue of fact. Under the general allegation of the respondent's demurrer attacking the sufficiency in law of the various articles it was impossible to determine the exact ground upon which the respondent relied. Learned counsel for the respondent, however, in his opening statement to the Senate, which he has since amplified in his brief, used the following language:

> So we mean that what was a crime at the common law may be made impeachable here, and that any laws which Congress has passed since that time, if violated by any civil officer of the Government, judge, or President, or anyone else, may be the subject of impeachment, and that there can be no other impeachable offenses.

In that statement we are advised for the first time of the exact ground upon which counsel for the respondent intends to attack the sufficiency in law of the articles of impeachment, viz, that they charge no indictable offense at common law or under the Federal statutes. He thus raises once more the question which has been discussed in almost every proceeding of this character, whether Federal or State. This contention is entitled to our respectful consideration on account of its age, if for no other reason. Time and time again it has been urged, only to be disregarded by the various courts of impeachment, as we shall show by the authorities cited later.

The learned counsel for the respondent, by interposing his demurrer to the sufficiency of the articles and insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

As bearing upon the question of law raised by the demurrer of the respondent I wish to call attention to two provisions of the Federal Constitution. Section 4, Article II, provides:

> The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors—

To which I shall hereafter refer as the removal section, and section 1, Article III, the second sentence thereof, which provides that—

> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior.

To which I shall hereafter refer as the judicial-tenure section.

It will be noted that the removal section immediately precedes the judicial-tenure section. The limitation of the judicial tenure to good behavior is the only limitation of that character to be found in the Federal Constitution upon the tenure of any of the civil officers of the Government. I therefore contend that it was the plain intention of the framers of the Constitution that, in so far as the Federal judges were concerned, the removal section was not intended to be antagonistic in its terms to the judicial-tenure section, immediately following it, and that the judicial-tenure section, which provides that the judicial term shall be during good behavior, was not intended to be antagonistic to the removal section, which immediately precedes it. These two sections must be construed together, and when so construed the judicial-tenure section is of necessity either an addition to the enumerated offenses in the removal section or a definition of the term "high crimes and misdemeanors," when applied to the judiciary, as including misbehavior. To say that the judicial tenure shall be limited to good behavior in one section of the Federal Constitution and then contend that the section of the Constitution immediately preceding that has destroyed its force and effect and has left the Federal Government without any machinery to pass upon the question of the forfeiture of the judicial tenure, or to take jurisdiction of acts which constitute misbehavior but are not criminal, is to treat the words "during good behavior" as surplusage. Such an interpretation violates all rules of construction.

THE LEGAL STATUS OF THE JUDICIAL TENURE.

What is the legal status of the judicial tenure and what determines that status? There are some considerations on which to base the claim that the legal status of the judicial tenure should be determined by the same principles that are applicable to a contract of hiring. The parties to the contract are the people of the United States and the candidate for a Federal judgeship. When he has been nominated by the President and confirmed by the Senate the commission tendered or delivered to him is an offer on the part of the people of the United States to the candidate, whereby they agree to enter into a contract on certain terms and conditions with the candidate and offer to pay him a fixed sum of money for the performance of certain services for them in accordance with the terms of the offer. No obligation on the part of the Government has yet attached; the candidate need not accept the offer; he is not compelled to qualify; that is a voluntary act on his part. (See Marberry *v.* Madison, 1 Cranch, 137.)

Section 257 of the judicial code provides that the Federal judges shall take a certain prescribed oath before they proceed to perform the duties of their respective offices.

The acceptance of the offer on the part of the candidate is evidenced by his oath, and when the oath is taken the contract of hiring becomes valid and binding on the parties to the same in accordance with the terms and conditions of the contract.

In this case the contracts between the United States and the respondent are evidenced by the various commissions and the various oaths accepting the same. The contract between the United States and the respondent as a circuit judge is evidenced by the commission bearing date the 31st day of January, 1911, in the words and figures following, to wit:

To all who shall see these presents, greeting:

Know ye that reposing special trust and confidence in the wisdom, uprightness, and learning of Robert Wodrow Archbald, of Pennsylvania, I have nominated and, by and with the advice and consent of the Senate, do appoint him additional circuit judge of the United States from the third judicial circuit, and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution and laws of the said United States, and to have and to hold the said office, with all the powers, privileges, and emoluments to the same of right appertaining unto him, the said Robert Wodrow Archbald, *during his good behavior.* Appointed pursuant to the act of June 18, 1910 (36 Stats., 540), and hereby designated to serve for four years in the Commerce Court.

In testimony whereof I have caused these letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Given under my hand, at the city of Washington, the 31st day of January, A. D. 1911, and of the independence of the United States of America the one hundred and thirty-fifth.

[SEAL.] WM. H. TAFT.

By the President:
GEORGE W. WICKERSHAM,
Attorney General.

The oath of office bears date the 1st day of February, 1911, in the words and figures following, to wit:

I, Robert Wodrow Archbald, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (36 Stats., 540), and designated to serve for four years in the Commerce Court, according to the best of my abilities and understanding, *agreeably to the Constitution and laws of the United States;* and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

R. W. ARCHBALD.

Subscribed and sworn to before me this 1st day of February, 1911.
[SEAL.] E. R. W. SEARLE,
Clerk District Court.

Under this state of facts, if we were not dealing with the Government as one of the parties to the contract, under constitutional limitations the contract could be abrogated for breach of condition if necessary and the rights of the parties determined in the courts of law.

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forfeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

HIGH CRIMES AND MISDEMEANORS.

In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the state against its own servants.

The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition of the criminal law should be applied in construing the meaning of the terms "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. While no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

Attention is often called to the discussion that took place in the Constitutional Convention between Col. Mason and Mr. Madison in which Mr. Madison suggested that the term "maladministration" was too vague and the phrase "high crimes and misdemeanors" was adopted. Attention was called to that by the distinguished counsel for the respondent in his opening statement.

On the strength of this passage in Madison's papers it is contended that Mr. Madison did not construe the phrase "high crimes and misdemeanors" as including maladministration. (3 Madison's Papers, 1528.)

We find, however, that Mr. Madison in a speech in Congress on the 16th day of June, 1789, on the bill to establish a department of foreign affairs, in discussing the possibility of abuse of power by the Executive, said:

Perhaps the great danger of abuse in the Executive's power lies in the improper continuance of bad men in office. But the power we contend for will not enable him to do this, for if an unworthy man be continued in office by an unworthy President the House of Representatives can at any time impeach him and the Senate can remove him, whether the President chooses or not. The danger then consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by the House before the Senate for such an act of *maladministration,* for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust. (4 Elliot's Debates, 375.)

This language clearly demonstrates that Mr. Madison believed that acts of maladministration which were not indictable were impeachable.

Nowhere in the English law of impeachment or in the Constitution of the United States or any of the States do we find any definition of impeachable offenses. The language of the Federal Constitution attempts no definition of impeachable offenses, and the general term "high crimes and misdemeanors" is not and was not intended to be a definition.

Under the State constitutions we sometimes find the added terms "mal and corrupt conduct," "corruption in office," and "maladministration," all general terms without attempting any technical definition. The reason for this is perfectly obvious, and is that the subject matter is not capable of technical definition. Who is wise enough to anticipate every manifestation of fraud that would give a chancellor jurisdiction and write it into a statute? It is the effect of acts under the circumstances of each particular case that confers jurisdiction. So it is with impeachments. No one can tell in advance in what way or from what source the danger may arise which demands the exercise of this power. The power of impeachment is recognized and authorized in every one of our constitutions, Federal and State, but the circumstances which warrant the exercise of that power are not defined and the necessity for its exercise is in the first instance left to the discretion of the House of Representatives. It is an indefinite and broad power incident to sovereignty, and its exercise in this country is demanded whenever the agents of sovereignty have acted in such a manner as to destroy their efficiency in the discharge of their duties to the sovereign. The existence of this power is necessary to the permanence of the State, and the exercise of the power is necessary whenever and however the welfare of the State may be threatened by its civil officers.

I wish at this point to submit for the consideration of the Senate the record in certain State trials of impeachments, with particular reference to their holdings on the question of whether the acts of a judge must be indictable to be impeachable, and then to make a very brief reference to the trials before the Senate of the United States.

IN THE MATTER OF THE IMPEACHMENT OF ALEXANDER ADDISON, ESQ., PRESIDENT OF THE COURT OF COMMON PLEAS IN THE CIRCUIT CONSISTING OF WESTMORELAND, FAYETTE, WASHINGTON, AND ALLEGHENY COUNTIES, IN THE STATE OF PENNSYLVANIA, ON AN IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES BEFORE THE SENATE IN THE YEAR 1803.

The constitution of the State of Pennsylvania of 1790 governed this proceeding, and section 3 of article 4 of said constitution is the impeachment section thereof and provides that all civil officers of the Commonwealth shall be liable to impeachment for any misdemeanor in office.

Section 2 of article 5 of that constitution provides that judges shall hold their offices during good behavior, but for any reasonable cause which shall not be sufficient ground of impeachment the governor may remove any of them on the address of two-thirds of each branch of the legislature.

In the year 1801 the attorney general of the State of Pennsylvania filed a motion in the supreme court of the State asking leave to file an information against Judge Addison, on the ground of misbehavior on the same state of facts as subsequently alleged in the articles. The supreme court refused to grant the motion because the affidavit did not charge a crime and intimated that there was another remedy applicable to that state of facts. And thereafter the house of representatives preferred articles of impeachment against Judge Addison, alleging that he had obstructed the free, impartial, and due administration of justice, contrary to the public rights and interests of the Commonwealth. (See Addison's trial, pp. 16–69, 151–154.)

The charge, in substance, amounted to a usurpation of power in preventing an associate judge from addressing the grand jury.

The plea interposed by Judge Addison was not guilty.

Mr. Dallas appeared for the managers, and Judge Addison conducted his own defense, and strenuously insisted that the allegations in the articles of impeachment did not charge an indictable offense, which was true.

He was, however, convicted by a vote of 20 to 4. The sentence was that Alexander Addison, president of the several courts of common pleas in the fifth district of this State, shall be, and he is hereby, removed from his office of president aforesaid, and also is disqualified to hold and exercise the office of judge in any court of law within the Commonwealth of Pennsylvania.

IN THE MATTER OF THE IMPEACHMENT PROCEEDINGS OF EDWARD SHIPPEN, CHIEF JUSTICE, JASPER YEATES AND THOMAS SMITH, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF PENNSYLVANIA, ON AN IMPEACHMENT BEFORE THE SENATE OF THE COMMONWEALTH, 1805.

Articles of impeachment were presented against these judges of the supreme court, because they adjudged Thomas Passmore guilty of a contempt of court and sent him to jail for 30 days and fined him $50.

It would seem to be clear that the act charged against the judges was not an indictable offense, and yet this question was not even raised by distinguished counsel for the judges, the chief of whom was that great lawyer, Mr. Dallas.

The judges were acquitted on the merits.

IN THE MATTER OF THE PROCEEDINGS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF MASSACHUSETTS RELATIVE TO THE IMPEACHMENT OF JAMES PRESCOTT, JUDGE OF PROBATE OF THE COUNTY OF MIDDLESEX, 1821.

This proceeding was had under the constitution of 1780. Article 8 of section 2, chapter 1, authorized the senate to hear and determine all impeachments made by the house of representatives against any officer of the Commonwealth for misconduct and maladministration in their offices. The constitution also provides that all judicial officers shall hold their offices during good behavior, and also provides for removal by the governor, with consent of the council, upon the address of both houses of the legislature.

Under this constitution it would seem that a majority vote was sufficient to convict.

February 5, 1821, the house presented 15 articles of impeachment at the bar of the senate. Article 3 charged that Judge Prescott held court at his law office and not in any probate court and granted letters of administration and warrants of appraisal for property and collected greater fees than the law allowed.

Article 12 charged the judge with advising a guardian and collecting a fee of $5 therefor, and allowing the charge in the account of the guardian as a proper charge against the estate for attorney fees.

From the answer of the respondent it appears that the difficulty arose out of a dispute as to the right to collect fees for certain services.

I feel justified in calling this case to the attention of the Senate because of the fact that Daniel Webster appeared for the respondent and Lemuel Shaw appeared as one of the managers on the part of the house. Of course, neither one of the acts alleged in these counts was indictable.

It was contended by Mr. Webster that the charge must be the breach of some known and standing law, the violation of some *positive* duty, and the power to impeach for other than indictable offenses was thoroughly discussed. Mr. Lemuel Shaw, in supporting the articles, said:

Some difference of opinion may arise as to the true construction and effect of these words "misconduct and maladministration in office" as they stand in the constitution, proceeding probably from the ambiguity and want of technical precision in the words themselves and probably from their connection with the other words in the same paragraph. The latter clause provides that the parties so convicted on impeachment shall be, nevertheless, liable to indictment, trial, judgment, and conviction according to the laws of the land. Perhaps the most reasonable construction of these provisions in the constitution taken together is that proceedings by impeachment and by indictment are had alio intuitu, designed and intended for distinct purposes, the one to punish the officer and the other the citizen. It is obvious that a person in official station is bound in common with all other citizens to obey the laws of the land, and is answerable to the ordinary tribunals for any violation of them. But the constitution establishes a broad and marked distinction between official delinquencies and offenses against social duty. Criminal acts, therefore, may be committed by an officer of such a nature as to render him liable to indictment and punishment in the courts of justice and at the same time being an obvious violation of his official duty and may render him liable to impeachment. Again, other acts may be supposed which, as breaches of the laws, would render an officer liable to indictment and punishment, but which do not in any way affect his official character and duty and would not render him liable to impeachment. The position is equally sound that acts may be committed by a public officer in direct violation of his official duty which would amount to misconduct and maladministration in office within the intent of the constitution, and which would consequently render the officer liable to impeachment, and of such a nature that the ordinary tribunals would not take notice of and punish them in their usual course of procedure and according to the laws of the land, for which, therefore, the offender would not be indictable. If this construction be true, an act may be punished both by indictment and impeachment, or the one or the other exclusively, according to its nature and circumstances.

Judge Prescott was found guilty on article 3 by a vote of 16 to 9, and on article 12 by a vote of 19 to 6, and was removed from office. (See Prescott's trial, pp. 7, 165, 180.)

Mr. Manager HOWLAND, continuing his argument, said:

Last evening I was addressing myself to the proposition that indictability was not a condition precedent to impeachability, and I had called the attention of the Senate to two leading State cases—that of Judge Alexander Addison in Pennsylvania in 1803 and that of Judge James Prescott in Massachusetts in 1821. Continuing the citation of precedents in support of the proposition laid down I now call the attention of the Senate to the case of Judge George G. Barnard, justice of the Supreme Court of the State of New York in 1872.

IN THE MATTER OF THE IMPEACHMENT OF GEORGE G. BARNARD, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, 1872.

In connection with this case I want to call the attention of the Senate to the fact that under the constitution of New York the judges of the court of appeals sat as members of the impeachment court together with the senate.

Judge George G. Barnard, justice of the Supreme Court of the State of New York, was impeached by the house of representatives, who presented 38 articles of impeachment, and the thirty-seventh article contained 15 specifications thereunder.

The allegations in the various counts are all charged as mal and corrupt conduct, and several of the counts extend or relate to transactions occurring during a previous term of office, to which counts the respondent interposed a plea to the jurisdiction, claiming that he could not be held accountable in this proceeding for acts done during the previous term. The court, however, overruled his plea by a vote of 23 to 9, holding that he could be held as a matter of law for acts done during a previous term.

A careful review of the acts alleged as mal and corrupt conduct in this case will disclose that none of the allegations would sustain an indictment.

I am unable to find in the constitution of 1846 and the amendments thereto in force at the time of this trial any enumeration of the grounds for the impeachment of judges. The constitution of 1821, article 5, section 2, provided that the assembly should have power of impeaching all civil officers of the State for mal and corrupt conduct in office and for high crimes and misdemeanors. I take it, however, that the adoption of the constitution of 1846 absolutely abrogated the constitution of 1821, so that in the Barnard trial, while they used the language of the constitution of 1821 and charged mal and corrupt conduct in office, that language has no constitutional force and effect in the proceedings and was simply descriptive of those acts which the house of representatives believed to be impeachable.

The same old question of power to impeach for other than indictable offenses was argued very thoroughly. Mr. Van Cott in presenting the case for the managers, on page 243 of volume 1, makes a statement of the test which should be applied in the proceeding, and which was subsequently applied in my judgment by the court.

Now, I have stated some of the general principles applicable to this case. I have stated a few of the orders, and it is now for this court, sitting, to define judicial good behavior and judicial bad behavior; to make the precedent which shall govern in all the future and make our future clear or make it anything but clear to us; to say that the conduct of the judge in these cases is lawful conduct, is good behavior, and sanction it as a safe and lawful precedent, or whether the court will condemn it and will say that there shall not be infused into the civilization and into the judicature of this State the morals of the Barbary coast and of the Spanish Main, for these proceedings were as mere buccaneering and lawless expeditions against persons and property as were ever pursued by pirates upon the high seas.

I would like particularly to call the attention of the Senate to article 37 and the specifications thereunder, which charges respondent with deporting himself in a manner unseemly and indecorous, using language coarse, obscene, and indecent, and using the process of the court to aid and benefit his friends and favoring suitors and counsel, and treating counsel in a coarse, indecent, arbitrary, tyrannical manner, and was guilty of conduct unbecoming the high position which he held, tending to bring the administration of justice into contempt and disgrace. These general allegations are laid more definitely in the specifications which follow.

It is perfectly apparent from the reading of these allegations that no indictable offense is charged, yet the court, by a vote of 24 to 11, found the respondent guilty under the thirty-seventh article.

IN THE MATTER OF THE IMPEACHMENT OF SHERMAN PAGE, A JUDGE OF THE DISTRICT COURT IN AND FOR THE COUNTY OF MOWER, STATE OF MINNESOTA, 1878.

Ten articles of impeachment were presented by the house of representatives and tried before the senate, charging malicious, arbitrary, and tyrannical use of power, and citing specific instances of the same.

Under the constitution of Minnesota judges were impeachable for corrupt conduct in office or for crimes and misdemeanors.

Article 5 charged that the said Sherman Page needlessly, maliciously, and unlawfully, with intent thereby to foment disturbance among the inhabitants of said county of Mower, and with further intent to insult and humiliate one George Baird, then sheriff of said county, issued two orders or commands to the sheriff, in substance directing him to quell riots and preserve the peace, and threatening him in case he disobeyed.

On June 5, 1878, Hon. Cushman K. Davis, counsel for the respondent, moved to quash article 5, saying:

The senate will perceive that we provided in the first sentence of our answer to article 5 that the article is insufficient in law of itself and charges no crime. For those reasons, whether a motion to quash be designated in that way or whether it is bringing a demurrer to the sufficiency of that article or whether it is a demurrer to proof is immaterial. I ask that this article may be dismissed from the consideration of the senate and from our own. (See Page trial, p. 623, 1st vol.)

The question being taken on the motion to quash, it was defeated by a vote of 21 to 15, and by that action of the senate was held good in law, although it did not charge a crime.

On the merits of the case judgment of acquittal was entered.

IN THE MATTER OF THE IMPEACHMENT OF THE HON. E. ST. JULIEN COX, JUDGE OF THE NINTH JUDICIAL DISTRICT OF MINNESOTA, BEFORE THE SENATE OF MINNESOTA AS A HIGH COURT OF IMPEACHMENT, 1882.

The constitution of Minnesota provided for the impeachment of judges for corrupt conduct in office or high crimes and misdemeanors in office. The house of representatives preferred a long list of articles of impeachment, charging specific instances of intoxication and averring that the use of intoxicating liquors had rendered the judge incompetent and unable to discharge the duties of said office with decency and decorum, faithfully and impartially, to the great disgrace of the administration of public justice, and so forth, by reason whereof he was guilty of misbehavior in office and of crimes and misdemeanors in office.

It will be noted that the acts alleged are not charged in the exact language of the constitution, but the allegation is that the respondent was guilty of misbehavior in office and of crimes and misdemeanors rather than of corrupt conduct in office and of crimes and misdemeanors, which is the language of the Minnesota constitution. To these articles of impeachment the respondent interposed a demurrer attacking their sufficiency in law. This demurrer was overruled to all of the articles except to article 19, which was sustained.

The respondent thereafter pleaded to the merits, and trial was had and he was found guilty of misbehavior in office and of crimes and misdemeanors in office on seven of the articles, and was removed from the office of district judge of the State of Minnesota and disqualified for and during the full period of three years to hold the office of judge of the district court of the State of Minnesota and of all other judicial offices of honor, trust, or profit in the State for the period of three years from the date of the judgment.

At the time of these proceedings drunkenness was not an indictable offense in the State of Minnesota, although there has since been passed a law making drunkenness an indictable offense.

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE.

IN THE MATTER OF THE IMPEACHMENT OF SENATOR WILLIAM BLOUNT.

Coming now to the impeachment trials before the Senate of the United States, the first case is that of Senator William Blount, in 1799, who was impeached for high crimes and misdemeanors, but the acts charged were not indictable. The case turned on the question of whether or not a Senator was a civil officer of the United States, but the power of impeachment was ably discussed in the argument.

Mr. Jared Ingersoll, of counsel for the respondent and who was a member of the Constitutional Convention from Pennsylvania, in discussing the removal section of the Constitution, said (U. S. Annals of Congress, vol. 8, p. 2286, 5th Cong.):

I add that I conceive that proceedings by impeachment are restricted not only to civil officers, but that the only causes cognizable in this mode of proceeding are malconduct in office.

And again, on page 2288, he said:

My argument is that what in England is said to be the most proper and has been the most usual in this particular is, by the Constitution of the United States, the exclusive grant of proceeding by impeachment. At least that none but civil officers of the United States are liable to be thus proceeded against. I do not say that the power is limited to malconduct in office.

I also insert here one paragraph from the plea drawn by Mr. Ingersoll and Mr. Dallas—

that although true it is that he, the said William Blount, was a Senator of the United States from the State of Tennessee at the several periods in the said articles of impeachment referred to; yet that he, the said William, is not now a Senator and is not nor was at the several periods so as aforesaid referred to an officer of the United States; nor is he, the said William, in any of said articles charged with having committed any crime or misdemeanor in the execution of any civil office held under the United States or with any malconduct in civil office or abuse of any public trust in the execution thereof. (U. S. Annots., 8th v., p. 2247.)

These quotations show that Mr. Ingersoll believed that malconduct in office was impeachable without reference to the indictability of the act.

Mr. Harper, who later defended Judge Chase, was one of the managers. In closing the argument in the Blount case, he said (p. 2316):

It seems to me, on the contrary, that the power of impeachment has two objects: First, to remove persons whose misconduct may have rendered them unworthy of retaining their offices, and, secondly, to punish those offenses of a mere political nature which, though not susceptible of that exact definition whereby they might be brought within the sphere of ordinary tribunals, are yet very dangerous to the public. These offenses, in the English law and in our constitutions, which have borrowed its phraseology, are called "high crimes and misdemeanors."

As bearing upon the meaning of the term "high crimes and misdemeanors," it might be interesting to note that in the Senate on the 8th of July, 1797, as a result of the proceedings previously held to expel Blount for the offenses for which he was subsequently impeached by the House, it was resolved:

That William Blount, Esq., one of the Senators of the United States, having been guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator, be, and he hereby is, expelled from the Senate of the United States. (Wharton's State Trials, p. 202.)

This quotation from the proceedings in the Senate shows the sense in which the term "high misdemeanor" was used by the Senate in its resolution of expulsion and is a precedent clearly in point on the proposition that the word "misdemeanor" as used in parliamentary proceedings does not necessarily refer to indictable offenses.

IN THE MATTER OF THE IMPEACHMENT OF JUDGE PICKERING.

The next impeachment proceeding is that of Judge Pickering, Federal judge in 1803.

He was impeached for refusing to allow an appeal in a certain matter and for drunkenness. He did not appear in person, but his son asked leave to file an answer in which he claimed that his father was insane, and certain affidavits were presented to substantiate this claim. He was found guilty on all the counts and removed from office. It certainly can not be claimed that drunkenness was an indictable offense, and yet, much to my surprise, I find in the brief of counsel in the case at bar that they attempt to make that claim. I submit that matter, however, to the judgment of the Senate. It is the first time I have ever heard that comment made on the Pickering case, with the possible exception of Mr. Harper in the Chase case, who qualifies it very materially. If it should be contended that Pickering was im-

peached on account of his insanity, it certainly would not be contended that insanity was an indictable offense. If it is held that this case was decided on the proof that Pickering was insane, then the case is an authority for the position that the proof of motive is not essential to a conviction under an impeachment charge.

IN THE MATTER OF THE IMPEACHMENT OF JUDGE CHASE.

The next case is that of Samuel Chase, Associate Justice of the Supreme Court, 1805.

The articles charged injustice, partiality, arbitrary power, rude and contemptuous conduct, and so forth.

None of the acts charged were indictable, and Judge Chase contended that he could not be impeached for offenses not indictable. Counsel for the judge did not go to this extent, and practically abandoned the contention, and the judge was acquitted on the merits.

Mr. Robert G. Harper, in closing the argument for Judge Chase, said (Hinds' Precedents, vol. 3, pp. 766–767):

The honorable gentleman who opened the case on the part of the prosecution cited the case of habitual drunkenness and profane swearing on the part of the judge as an instance of an offense not indictable and yet punishable by impeachment. But I deny his position. Habitual drunkenness in a judge and profane swearing in any person are indictable offenses. And if they were not, still they are violations of the law. I do not mean to say that there is a statute against drunkenness and profane swearing. But they are offenses against good morals, and as such are forbidden by the common law. They are offenses in the sight of God and man, definitive in their nature, capable of precise proof, and a clear defense.

In concluding a short discussion of the Pickering case, Mr. Harper said:

This case therefore proves nothing further than that habitual drunkenness is an impeachable offense.

In concluding a discussion of the Addison case, Mr. Harper said:

But I am free to declare that if Judge Addison's colleague did possess those rights, and if he did arbitrarily prevent and impede the exercise of them by an unconstitutional exertion of the powers of his office, he was guilty of an offense for which he might properly be impeached, because he must in that case have acted in express violation of the constitutions and laws.

In the foregoing statements Mr. Harper takes the position that offenses against good morals, habitual drunkenness, usurpation of power, are impeachable offenses, and in so doing clearly abandons the position that indictability is a condition precedent to impeachability.

IN THE MATTER OF THE IMPEACHMENT OF JUDGE PECK.

The fourth case was that of James H. Peck, a United States judge, in 1830.

He was impeached for "high misdemeanors in office," for imprisoning a lawyer for contempt of court.

His answer conceded the liability to impeachment on facts which would not be indictable in the following words (par. 3, p. 62, Peck's Trial):

If the court erred in adjudging and punishing it as a contempt, was it an innocent error of judgment on the part of the court or was it a high misdemeanor, because willfully and knowingly done in violation of law and with the intention imputed by the article of impeachment, to wit, wrongfully, arbitrarily, and unjustly to oppress, imprison, and otherwise injure the said Luke E. Lawless under color of law?

This respondent presumes that it is only by making good the affirmative of the last proposition that the impeachment against him can be sustained.

Clearly admitting that indictability is not a condition precedent to impeachability.

IN THE MATTER OF THE IMPEACHMENT OF JUDGE HUMPHREYS.

The fifth case was that of West H. Humphreys, a Federal judge, in 1862.

Humphreys was charged with making secession speeches, and in two of the seven articles was charged with treason.

Making secession speeches was not an indictable offense, and the Senate voted separately and found him guilty on each article, so that this case is an authority that indictability is not a necessary element to sustain impeachment.

IMPEACHMENT OF PRESIDENT JOHNSON.

In the impeachment trial of Andrew Johnson he was charged with sundry and divers acts, several of them alleging that he had violated the provisions of the law known as the "tenure of office act," and which under the terms of the act probably constituted an indictable offense.

The celebrated swing-around-the-circle article, charging him with making incendiary speeches, of course did not charge an indictable offense, but the Senate in the consideration of the various articles did not come to a vote upon this particular article, for after they had voted on three articles the Senate adjourned without day.

In this connection I wish to quote a few sentences from the argument of Mr. Thaddeus Stevens in closing the debate in the House on the resolution impeaching President Johnson (Globe, p. 1399):

Impeachment under our Constitution is very different from impeachment under the English law. The framers of our Constitution did not rely for safety upon the avenging dagger of a Brutus, but provided peaceful remedies which should prevent that necessity. England had two systems of jurisprudence—one for the trial and punishment of common offenders, and one for the trial of men in higher stations, whom it was found difficult to convict before the ordinary tribunals. The latter proceeding was by impeachment or by bills of attainder, generally practiced to punish official malefactors; but the system soon degenerated into political and personal persecution, and men were tried, condemned, and executed by this court from malignant motives. Such was the condition of the English laws when our Constitution was framed, and the convention determined to provide against the abuse of that high power so that revenge and punishment should not be inflicted upon political or personal enemies. Here the whole punishment was made to consist in removal from office, and bills of attainder were wholly prohibited. We are to treat this question, then, as wholly political, in which if an officer of the Government abuse his trust or attempt to pervert it to improper purposes, whatever might be his motives, he becomes subject to the impeachment and removal from office. The offense being indictable does not prevent impeachment, but is not necessary to sustain it.

I will also quote from the opinion of the Hon. George F. Edmunds in the trial of Andrew Johnson, Supplement Congressional Globe, page 428:

In my opinion this high tribunal is the sole and exclusive judge of its own jurisdiction in such cases, and that, as the Constitution did not establish this procedure for the punishment of crime, but for the secure and faithful administration of the law, it was not intended to cramp it by any specific definition of high crimes and misdemeanors, but to leave each case to be defined by law, or, when not defined, to be decided upon its own circumstances in the patriotic and judicial good sense of the Representatives of the States. Like the jurisdiction of chancery in cases of fraud, it ought not to be limited in advance, but kept open as a great bulwark for the preservation of purity and fidelity in the administration of affairs, when undermined by the cunning and corrupt practices of low offenders or assailed by bold and high-handed usurpation or defiance, a shield for the honest and law-abiding official, a sword to those who pervert or abuse their powers, teaching the maxim which rulers endowed with the spirit of a Trojan can listen to without emotion, that "kings may be cashiered for misconduct."

IN THE MATTER OF THE IMPEACHMENT OF WM. W. BELKNAP, SECRETARY OF WAR.

This case has no bearing on the propositon of law under discussion, but is clearly an authority that the Senate will hold jurisdiction to try an ex-civil officer who is a private citizen for acts done in office. The fact that jurisdiction is determined by a majority, and conviction requires two-thirds is important only in so far as the jurisdictional question might affect the final vote on the merits. Applying the precedent established by the Belknap case to the case at bar, if the Senate has jurisdiction to try a private citizen for acts done when in office, it certainly has jurisdiction to try a circuit judge for acts done as district judge where there has been continuity of service of the same character.

IN THE MATTER OF THE IMPEACHMENT OF JUDGE SWAYNE.

In this case an elaborate brief was filed which, though signed by counsel for the respondent, was most carefully and politely disowned by them. (Hinds III, p. 454.) It was contended in the brief that indictability was a condition precedent to impeachabilty—a position which was not urged by counsel for the respondent at the trial. I am glad to be able to quote from the brief of counsel in the pending trial to substantiate the claim that in the Swayne case the proposition that indictability was a condition precedent to impeachability was entirely abandoned. (Respondent's brief, p. 39.)

On reading the proceedings in that trial (Swayne) we are unable to find that counsel for Swayne discussed at all the question whether it was necessary for the conviction of their client that it should be charged and proven that he had committed an indictable offense.

Mr. President, we have shown that the doctrine that indictability is a condition precedent to impeachability finds no constitutional warrant to sustain it, is antagonistic to any proper conception of the object and purpose of impeachment, and is absolutely repudiated by an unbroken line of precedents, both State and Federal. We therefore conclude that the power to impeach is properly invoked to remove a Federal judge whenever, by reason of misbehavior, misconduct, malconduct, or maladministration, the judge has demonstrated his unfitness to continue in office, and with confidence in the correctness of our judgment we await the decision of the Senate.

ARGUMENT OF MR. NORRIS, ONE OF THE MANAGERS ON THE PART OF THE HOUSE.

Mr. Manager NORRIS. Mr. President, I shall not weary the Senate with any further discussion of the facts as they have been developed in this case. My colleagues who have already addressed the Senate have analyzed and considered the evidence in all of its various phases. I desire, however, to briefly state my views on some of the legal questions of the case that have arisen in this trial.

In some of the articles of impeachment the respondent is charged with misbehavior in office, and it is claimed, as far as these articles are concerned, that he is not guilty of any

offense which would properly be the subject of a prosecution by indictment or information in a criminal court. It is strenuously argued by attorneys for respondent that an impeachment lies only for offenses which are criminal in their nature and which could legally be the subject of prosecution by indictment.

WHAT OFFENSES, PARTICULARLY AS APPLIED TO JUDGES OF THE UNITED STATES COURTS, ARE IMPEACHABLE UNDER THE CONSTITUTION?

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and indeed has never been questioned, that to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives; and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute.

Section 4 of Article II of the Constitution reads as follows:

> The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

It will be noted that this provision of the Constitution applies to all civil officers of the United States alike. It is undisputed that it includes judges, and were there no other provision of the Constitution applying particularly to the conduct or the tenure of office of judges then there would be no distinction between the impeachment and trial of judges and any other civil officer, including the President and Vice President. But section 1, Article III, so far as the same is applicable to this case, provides:

> The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior.

This provision of the Constitution, it will be obverved, applies only and exclusively to judges. It has no relation to any other civil officer of the Government, and if we are not to nullify it entirely we will find that it bears a very important part in the consideration of the particular branch of the case under discussion. I desire the Senate to continually bear in mind and to faithfully observe at all times during the consideration of this subject, that in the construction of any legal document or instrument the court will so construe it as to give life and vitality to every part of the instrument, if it can reasonably and logically do so. It is our duty to construe these two provisions of the Constitution together, and, if possible, to give equal vitality and life to them both.

Most of the civil officers provided for by the Constitution have a definite fixed term, but the judges hold office during good behavior. Much of the contention arises over what is meant in section 4, Article II, by the word "misdemeanor." It is contended by the respondent that this word is intended only to apply to such offenses as are indictable and punishable under the criminal law, and that a judge can not be impeached and removed from office unless his offense, whatever it may be called, is at least of so high a degree as to make it criminal and indictable. This construction, if adhered to, absolutely nullifies that provision of section 1, Article III, above quoted, which provides that judges shall hold their offices during good behavior. If judges can hold their offices only during good behavior, then it necessarily and logically follows that they can not hold their offices when they have been convicted of any behavior that is not good. If good behavior is an essential to holding the office, then misbehavior is a sufficient reason for removal from office. And if, therefore, we give full life and vitality to both of these provisions of the Constitution, we must hold that the lack of good behavior, or misbehavior, mentioned in section 1, Article III, is synonymous with the word "misdemeanor" in section 4, Article II, in all cases where the offense is less in magnitude than an indictable one.

This view of these provisions of the Constitution has been sustained by practically all of the leading law writers upon the subject. It has also been sustained by the Senate in the trial of prior impeachment cases that have taken place. John Randolph Tucker, in his Commentaries on the Constitution (Vol. I, sec. 200), after discussing the question at some length and enumerating many offenses that are impeachable, uses this language:

> But if he decides unconscientiously—if he decides contrary to his honest convictions from corrupt partiality—this can not be good behavior and he is impeachable. Again, if the judge is drunken on the bench, this is ill behavior, for which he is impeachable, and all of these are generally criminal or misdemeanors, for misdemeanor is a synonym of misbehavior. * * * To confine the impeachable offenses to those which are made crimes or misdemeanors by statute or other specific law would too much constrict the jurisdiction to meet the objects proper of the Constitution, which was, by impeachment, to deprive of office those who by act of omission or commission showed great and flagrant disqualification to hold it.

George Ticknor Curtis, in his work on the Constitutional History of the United States (p. 481), in discussing impeachment, uses this language:

> The object of the proceedings is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office or aside from its functions, he has violated a law or committed what is technically denominated a crime. But a cause for removal from office may exist where no offense against positive law has been committed.

Watson, in his work on the Constitution (vol. 2, p. 1034), takes the same position and says that the word "misdemeanor" is the same as "misdeed, misconduct, misbehavior, voluntary transgression." Practically the same position is taken by Foster in his work on the Constitution, in section 93. This position is sustained by a full review of the question in the American and English Encyclopedia of Law, but these cases have already been called to the attention of the Senate. These citations showed that the Senate has in the past found officials guilty where the crime charged was not an indictable offense.

In Black on Constitutional Law, second edition, pages 121 and 122, it is said:

> Treason and bribery are well-defined crimes. But the phrase "other high crimes and misdemeanors" is so very indefinite that practically it is not susceptible of exact definition or limitation, but the power of impeachment may be brought to bear on any offense against the Constitution or the law which, in the judgment of the House, is deserving of punishment by this means or is of such a character as to render the party accused unfit to hold and exercise his office. It is of course primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment.

Further on the same writer says:

> It will be observed that the power to determine what crimes are impeachable rests very much with Congress; for the House, before preferring articles of impeachment, will decide whether the acts or conduct complained of constitute a "high crime or misdemeanor," and the Senate in trying the case will also have to consider the same question.

EVEN IF WE ADMIT "MISDEMEANORS" AS USED IN SECTION 4, ARTICLE II, APPLIES ONLY TO INDICTABLE OFFENSES, YET A JUDGE CAN BE IMPEACHED FOR MISBEHAVIORS OF A LESS GRADE THAN INDICTABLE OFFENSES UNDER SECTION 1, ARTICLE III.

But suppose, for the sake of argument, it be admitted that "misdemeanors" as used in section 4, Article II, was intended by the framers of the Constitution to exclude all offenses that were not indictable under the law, it would still not necessarily follow that judges could not be impeached and removed from office for misdemeanors of so low a grade that they were not indictable. This section simply provides that all the civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, and other high crimes and misdemeanors. If in any other provision of the Constitution additional reasons for impeachment are given of some of these specified officers, or additional reasons are given why some of them should cease to hold office, then under such provision such specified officers could be tried, impeached, and removed even though the offense of which they might be guilty was not included in any of those enumerated in section 4, Article II.

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If, for instance, the President was expressly excluded from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office excepting the expiration of his regular term. But if judges were expressly eliminated from this section and it read "all civil officers of the United States except judges, and so forth," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a

judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power, and is therefore subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

Any authority that has been cited by the respondent which shows or tends to show that a President, Vice President, or other civil officer other than a judge can not be impeached except the offense is at least of the grade of a misdemeanor that is indictable does not apply to the impeachment or trial of a United States judge. To hold that an officer whose tenure of office is definite and fixed and who will necessarily go out of office within the course of a year or two should not be impeached and removed from office for a misbehavior that does not reach in magnitude an indictable offense is entirely different from holding that an officer whose term of office ordinarily lasts for life should not be so impeached and removed. And our forefathers evidently had this distinction in mind when they applied exclusively to judges that provision of the Constitution which provides that judges shall hold their offices during good behavior.

If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument, who not only makes such arrangement but who initiates it, is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful, can not be convicted of any crime; but he is guilty of a misbehavior. No one will dispute it. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fall. It could not survive. Are we helpless? Must we say that although the Constitution says the judge shall only hold his office during good behavior, that the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors" and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

As to what is misbehavior in office must be determined in the first place by the House of Representatives when they adopt the articles of impeachment. It must be redetermined by the Senate when, after listening to the evidence, they pass judgment upon the case. I think all will agree that any conduct on the part of a judge which brings the office he holds into disgrace or disrepute, or which results or has a tendency to result in the denial of absolute justice to all persons engaged in litigation in his court, is a misbehavior. Certainly such conduct is not good behavior, and the Constitution provides that he shall only hold office during good behavior. Therefore it follows that in the absence of good behavior on the part of the judge he should be removed from office. It is undoubtedly true that the House of Representatives, in passing upon articles of impeachment and the Senate upon the trial of the offense charged in such articles, where only misbehavior in office was shown, would take into consideration in reaching their conclusions not only the magnitude of such misbehaviors but the frequency of their occurrence. Where the evidence shows that a judge is continually misbehaving by engaging in conduct and practices that bring his office into disrespect and disrepute, the House and the Senate can not avoid their duty or their responsibility by saying that each distinct offense is in itself of small magnitude and not indictable.

An eminent writer on the Constitution has summed up the question in the following forcible and appropriate language:

A civil officer may so behave in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute do with the constitutional provision relative to judges which says, "Judges, both of the supreme and inferior courts, shall hold their office during good behavior"? This means that as long as they behave themselves their tenure of office is fixed and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says "A judge shall hold his office during good behavior," it means that he shall not hold it when it ceases to be good. Suppose he should refuse to sit upon the bench and discharge the duties which the Constitution and the law enjoin upon him, or should become a notoriously corrupt character and live a notoriously corrupt and debauched life? He could not be indicted for such conduct, and he could not be removed except by impeachment. Would it be claimed that impeachment would not be the proper remedy in such a case? (Watson on the Constitution, vol. 2, pp. 1036, 1037.)

CAN A CIRCUIT JUDGE BE IMPEACHED FOR MISBEHAVIOR OCCURRING WHILE HE HELD THE OFFICE OF DISTRICT JUDGE?

In this case some of the articles of impeachment charge the respondent with offenses committed while he held the office of district judge. It will be remembered that the evidence discloses that while the respondent was holding the office of district judge he was appointed circuit judge. He passed directly from one office into the other and no interim lapsed between the time that he held the office of district judge and the time when he became circuit judge, which office he still holds. And the technical defense is made by the respondent that he can not be impeached for any misconduct or misbehavior that occurred while he was holding the office of district judge. The change was in the nature of a promotion, but the nature of his office is practically the same. The Senate will take judicial notice of the fact that at the time the respondent was district judge he had authority and jurisdiction, under the law, to sit as a circuit judge and to hold circuit court. It is a well-known fact that the district judges prior to the adoption of our code practically did all of the work in the circuit courts. Indeed, in this case in most of the particular offenses charged the respondent, although a district judge, was engaged in the function of holding circuit court. The Peale case and the Rissinger case were cases pending not in the district court, but in the circuit court, and the respondent in each case was the presiding judge. I think that the authorities are pratically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties of that office and the one he holds at the time of the impeachment are practically the same or are of the same nature. The Senate must bear in mind, as stated by all of the authorities, that the principal object of impeachment proceedings is to get rid of an unworthy public official. In the State of New York it was held in the Barnard case that the respondent could be impeached and removed from office during his second term for acts committed during his first term. And in the State of Wisconsin the court held the same way in the impeachment of Judge Hubbell. To the same effect was the decision in Nebraska upon the impeachment trial of Gov. Butler. On this point the respondent relies upon the case of the State *v.* Hill (37 Nebr., p. 80).

In that case the State treasurer of Nebraska was impeached after he had completed his term and retired to private life. The articles of impeachment were not passed on by the legislature, in fact were not even introduced in the legislature until after the respondent had served his full term, and the court there held that impeachment did not lie; but it expressly approved the judgment of the New York court in the Judge Barnard case, the judgment of the Wisconsin court in the Judge Hubbell case, and the prior judgment of the Nebraska court in the Butler case. And the court, in giving its reason, expressly stated that the object of impeachment as defined by the constitution of that State was to remove a corrupt or unworthy officer, and that inasmuch as his term had expired prior to his impeachment he was no longer in office and the object of the constitution had been attained, and therefore impeachment would not lie. In the case at bar the functions of the office held by the respondent as district judge were practically the same as his official functions when he was made circuit judge. They were of the same nature

and would be directly affected by the same misconduct in office. He has held a Federal judgeship continuously during all the time of the commission of all of the alleged offenses.

CONCLUSION.

The House in presenting the articles of impeachment were performing an official duty. The managers on the part of the House have undertaken to carry out the mandate of that body without any malice, without any ill will, but without fear or favor. Like the balance of our fellow citizens, we hold the judiciary in the highest respect. We are anxious that the citizenship generally should have for it unbounded respect and unlimited admiration. We realize that it is only by the confidence that the people have in public officials that the stability of our institutions can be maintained. When public officials disregard their duty and violate the common standards of propriety with impunity, the standard of our citizenship is lowered and the very foundation of our Government is threatened. Of all the departments of government the judiciary is and ought to be held in the highest regard. Our Government can not perform its full destiny unless the courts are above reproach and the judges above suspicion.

It is not for the managers to say what the verdict of the Senate shall be. We have done our best to give you a fair, honest, and impartial presentation of the evidence and the law as we see it and understand it. To the best of our ability we have performed our duty. Our responsibility is about ended, and your greatest responsibility is just before you. That you will perform it without fear, without favor, without prejudice, and render such judgment as you believe to be righteous is our earnest belief and our sincere conviction.

ARGUMENT OF MR. DAVIS, ONE OF THE MANAGERS ON THE PART OF THE HOUSE.

Mr. Manager DAVIS. Mr. President, the issues presented by the case before the Senate, whether of law or fact, would seem to be neither numerous nor complex. After the exhaustive and able discussion which has been had by gentlemen who have already spoken, only the vain could hope to add anything of clarity or adornment to their presentation. I address myself, therefore, to the single purpose of showing into how narrow a compass the issues may be compressed, and shall make my remarks more in the nature of an index than a commentary.

To simplify the argument, let us admit that none of the acts with which the respondent is charged are denounced by any express legislative enactment nor are they punishable as crimes either by statute or at common law; we may go further and, for the sake of argument, concede that none of them, if done by a private individual, would in themselves evince any degree of moral turpitude. Indeed, it is even possible, although difficult, to conceive that in a moment of thoughtlessness, without due reflection upon the restraints of his position or the necessary implication arising from his course, a judge upon the bench might commit certain of the indiscretions here alleged without an intentional surrender of his judicial purity or a deliberate willingness to profit by his exalted station. But when such things are done by an occupant of the bench, and being done are repeated and persisted in, then in the opinion of the body by which these charges are preferred condonation is impossible. A course so continued amounts to gross misbehavior and demonstrates the unfitness of the man guilty of such delinquencies, and by such misconduct he forfeits, as we claim, the condition of his official tenure, which is good behavior. The case, when all is said, comes to this: Does the proof show the respondent unfit to continue in the office which he holds, and, if so, has this court power, by process of impeachment, to remove him?

Quite naturally the latter question comes on first to be examined. When the jurisdiction of the court is challenged or the sufficiency of an indictment is called in question it is useless to investigate the facts until these matters are disposed of. The issue at once narrows itself down to the meaning of the phrase "high crimes and misdemeanors" occurring in Article II, section 4, of the Constitution; and the respondent now renews the oft-repeated contention that this language can be used only with reference to offenses which, either by common law or by some express statute, are indictable as crimes. This same proposition has been so often refuted in the past and has been so conclusively disposed of in the course of this argument that it is difficult to add more. Every canon of construction which can be applied to this clause of the Constitution negatives the position which counsel for the respondent assume. Test it by the context, by contemporary interpretation, by precedent, by the weight of authority, and by that reason which is the life of every law and the answer is always the same.

In the first place, when we read this clause of the Constitution, as we are required to do, in the light of the context of the instrument we are confronted at once by the clause fixing the tenure of judges of the Federal courts during good behavior; and if it be difficult, as counsel for respondent assert, to enlarge the phrase "high crimes and misdemeanors" so as to embrace acts not indictable as crimes, it is certainly far more difficult to restrict "good behavior" to the narrow limits fixed by the criminal law. To say that a judge need take as the guide of his conduct only the statutes and the common law with reference to crimes, and that so long as he remains within their narrow confines he is safe in his position, is to overlook the larger part of the duties of his office and of the restraints and obligations which it imposes upon him. We insist that the prohibitions contained in the criminal law by no means exhaust the judicial decalogue. Usurpation of power, the entering and enforcement of orders beyond his jurisdiction, disregard or disobedience of the rulings of superior tribunals, unblushing and notorious partiality and favoritism, indolence and neglect—all are violations of his official oath, yet none may be indictable. Personal vices, such as intemperance, may incapacitate him without exposing him to criminal punishment. And it is easily possible to go further and imagine such indecencies in dress, in personal habits, in manner and bearing on the bench, such incivility, rudeness, and insolence toward counsel, litigants, or witnesses, such willingness to use his office to serve his personal ends, as to be within reach of no branch of the criminal law, yet calculated with absolute certainty to bring the court into public obloquy and contempt and to seriously affect the administration of justice. Can it be possible that one who has so demonstrated his utter unfitness has not also furnished ample warrant for his impeachment and removal in the public interest?

Stated in its simplest terms, the proposition of counsel is to change the language of the Constitution so that instead of reading that—

the judges both of the Supreme and inferior courts shall hold their offices during good behavior—

It will read that—

the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime.

If the latter were the true meaning, is it conceivable that the careful and exact stylists by whom the Constitution was composed would have used an ambiguous term to express it?

But counsel ask, What shall be done with that clause which provides that in case of impeachment—

the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law?

This they insist is a definition by implication, and signifies that the scope of impeachment and indictment is one and the same, although the mode of trial and the penalty to be inflicted may differ. We submit, on the contrary, that this clause instead of being a declaration that impeachment and indictment occupy the same field is a recognition of the fact that the field which they occupy may or may not be identical, and recognizing this fact it merely declares that when the field of impeachment and the field of indictment overlap there shall be no conflict between them, but that the same offense may be proceeded against in either forum or in both.

The light drawn from contemporary speeches and writings confirms the position for which we contend. It is true, as counsel will point out, that in the Constitutional Convention when the word "maladministration" was proposed it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead; but it is also true that on the 16th day of June, 1779, when debating in the House of Representatives the propriety of giving to the President the right to remove an officer, he said:

The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this House before the Senate for such an act of maladministration, for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.

His great co-laborer, Alexander Hamilton, discussing in the sixty-fourth number of the Federalist the Senate as a Court of Impeachment, says:

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated "political," as they relate chiefly to injuries done immediately to the society itself. * * * What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of national inquest into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the Nation as the representatives of the Nation themselves? * * * As well the latter (State constitutions)

as the former (the British constitution) seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the Government. Is not this the true light in which it ought to be regarded? * * * The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges as in common cases serve to limit the discretion of courts in favor of personal security.

And, again, in the seventy-eighth number of the Federalist, when making an examination of the judiciary department, we read from his pen that—

According to the plan of the convention all judges who may be appointed by the United States are to hold their offices during good behavior, which is conformable to the more approved of the State constitutions and among the rest to those of this State. Its propriety having been drawn into question by the adversaries of that plan is no light symptom of the rage for objections which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of governments. In a monarchy it is an excellent barrier to the despotism of princes; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

And continuing the same examination in the following paper, the seventy-ninth, he goes on:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate, and if convicted may be dismissed from office and disqualified for holding any further. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.

And then evidently treating the word "malconduct" as covering the whole category of voluntary actions on the part of the judge which would go to his judicial character or fitness, he discusses the want of a provision for removing the judges on account of physical or mental inability as being the only emergency unprovided for. He has in mind chiefly the inability arising from advanced age, and calls attention to the difficulty of measuring the faculties of the mind and the opportunity which the attempt would give for the play of personal and party attachments and enmities.

The result—

Says he—

except in the case of insanity must for the most part be arbitrary; and insanity without any formal or express provision may be safely pronounced to be a virtual disqualification.

It can be safely said that nothing was further from the minds of the men who framed the Constitution than the construction here contended for by respondent's counsel.

Again we may look to the precedents, only to find that the word "misdemeanor" has always been treated as having a meaning of its own in parliamentary law, and that one impeachment proceeding after another has been based upon offenses not within the law of crimes. I do not repeat the many authorities for this statement which my colleagues have cited. This body, of course, being a law unto itself, is bound by no precedents save those of its own making, and even as to them no doubt has the power which any other court enjoys to overrule a previous decision, if convinced of its error. Of the cases which have been tried in this Chamber, those of Blount, Pickering, Chase, Peck, Humphreys, and Swayne have been pointed out as involving in whole or in part charges not criminal in their character. So, also, have many other cases tried in similar forums under similar constitutional provisions. Persuasive precedents are also to be found in the records of those cases investigated by the House of Representatives where articles of impeachment were authorized by a vote of the House, but for one cause or another were never tried. Such, for instance, was the case of Judge Lawrence, of the District Court of the United States for the Eastern District of Louisiana. During the year 1839 he was charged with the unauthorized removal of the clerk of his court and various improper orders made in the effort to get possession of the seal and records in the clerk's custody, with refusal to obey mandates of the Supreme Court, and with intemperance. The committee which investigated these charges recommended his impeachment for "misdemeanors in office." It is perhaps significant that the word "crimes" was intentionally omitted. The report came in as the Twenty-fifth Congress neared its close and no action was had. Doubtless the reason why the matter was never pressed is to be found in the fact that on the 3d day of September, 1841, Theodore H. McCaleb was appointed judge in his room and stead.

Again, in the year 1872, in the Forty-second Congress, the House of Representatives impeached at the bar of the Senate for "high crimes and misdemeanors" Mark H. Delahay, United States district judge for Kansas. Benjamin F. Butler headed the committee in charge and stated that—

The most grievous charge and that which is beyond all question was that his personal habits unfitted him for the judicial office; that he was intoxicated off the bench as well as on the bench.

Although there was a question as to certain alleged corrupt transactions, Mr. Daniel W. Voorhees, of Indiana, said that it was not proven to the satisfaction of several members of the committee that there was any malfeasance in this regard; but Mr. Butler said:

The committee agree that there is enough in his personal habits to found a charge upon.

Here again the resolution was reported just as Congress was about to expire, and before any further proceedings could be had the successor of Judge Delahay was appointed.

So also in the case of Judge Durell, of the United States District Court for Louisiana, in the same Congress, against whom a resolution of impeachment was reported on the ground of his usurpation of power in issuing the so-called "midnight order" putting the United States marshal in charge of the building in the city of New Orleans in which the State legislature was about to assemble. There was no pretense, of course, that this act on his part would have warranted an indictment. The matter was summed up by Mr. Benjamin F. Butler in these words:

It seemed to me so gross an exercise of power that if the judge did not know he was exceeding his powers he ought to have known it; and in either case if he did know of course he was wrong, and if he did not know he ought to have known, and therefore he did not conduct himself well in office.

Pending the proceedings Judge Durell resigned, and for this reason only the matter was discontinued.

But without stopping to multiply precedents further, we next call attention to the long list of eminent authorities and commentators on the Constitution who uphold the construction for which we contend—Story, Curtis, Cooley, Tucker, Watson, Foster, all these and many more have been cited in the course of this discussion. Speaking as a lawyer, it must be said that the weight of authority in our favor is overwhelming.

Last of all we resort to the highest of all canons for the construction of constitutions and statutes alike, viz, "the reason of the thing." It is true that the framers of the Constitution intended to create an independent judiciary, but they never contemplated a judiciary which should be totally irresponsible. Regarding public office as a public trust, they found it necessary to lodge somewhere the power to determine whether that trust had or had not been abused. In the appointment of judges they required that the judgment of the President with reference to individual fitness should be concurred in by the Senate, and quite naturally they gave to the body which had approved the appointment the power to withdraw that approval and dismiss the officer when he had shown himself faithless to his trust. In requiring first of all a majority of the House of Representatives in order to prefer articles of impeachment and then two-thirds of the Members of the Senate present to convict, they hedged the power about with all the safeguards necessary to protect the upright official and yet leave it sufficient play to preserve the public welfare. Experience has shown how more than adequate the machinery so provided has been to prevent hasty or intemperate action. Indeed, it would seem that if the fathers erred it was in making too slow and difficult the process of removing the unfaithful and unfit. I hope—indeed, I believe—that this high court will never sanction any construction of the Constitution which will render it practically impotent for the purposes of its creation.

But in the brief filed by counsel for the respondent it is suggested that if an impeachable offense need not be criminal in fact it must still be criminal in its nature. It will at once be clear that this is a definition which does not define, and that the phrase "criminal in its nature" has no more certainty to commend it than has "good behavior." Recognizing this to be true, counsel go on to say, in the attempt to define their own language, that—

for the same reason, even if the misdemeanors for which impeachment will lie are not necessarily indictable offenses, yet they must be of such a character as might properly be made criminal.

We are not called on to agree with their position as so stated, but have no great cause to fear it.

We understand a crime or misdemeanor to be, in the language of Blackstone—

An act committed or omitted in violation of a public law either forbidding or commanding it.

If the phrase "criminal in nature" means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description. Certainly Congress could, by express criminal statute,

forbid a Federal judge to accept gifts of money from members of his bar, to communicate in private either orally or by letter with counsel in reference to cases pending for decision, to request financial favors from parties litigant before him, and as to the Commerce Court might well forbid the members of that court to engage in the business of hunting bargains from railroad companies engaged in interstate commerce. And, certainly, if such things are not already misdemeanors or misconduct or misbehavior, a statute to forbid them can not come too soon.

So much for the law of the case. What of the facts?

The articles of impeachment call attention to 11 distinct acts of misconduct and misbehavior on the part of the respondent and close with the thirteenth article drawing the necessary inference from the specific acts alleged. In point of time they may be divided between the service of Judge Archbald as a district judge and his service as circuit judge and judge of the Commerce Court. Five of them occurred during his district judgeship, to wit: The appointment of Jury Commissioner Woodward, the Rissinger note and the Honduras gold-mining transaction, the John Henry Jones note and the Venezuelan land speculation, the Cannon trip and the purse from the members of his bar. Those during his circuit judgeship are: The Katydid deal, the Marian Coal Co. settlement, the deal for the dump known as Packer No. 3, the transaction with Frederick Warnke, the James R. Dainty-Everhart matter, and the correspondence with Helm Bruce.

For want of time I pass by those things which occurred during his district judgeship and classify again the six occurrences charged against him as circuit judge. Five of these have to do with transactions between himself and officers of railroads or their subsidiaries, and one with the correspondence between himself and counsel for a railroad company with reference to a pending cause. I shall not undertake to repeat what has been said as to the details of these transactions nor do I conceive it to be necessary to this case to decide the minor issues of fact which are raised as to each of them, such, for instance, as the actual value of the "Katydid culm dump," which consumed so much of the time of this trial. The undisputed or admitted facts are all sufficient, and when we come to look to these five transactions with these five different railroad companies, they present certain points of similarity too striking to escape comment. These points of curious resemblance touch the very core of this whole case.

Take the Katydid, Marian, Packer No. 3, Warnke, and the Dainty-Everhart transactions and observe, first, that Robert W. Archbald was commissioned circuit judge of the United States and assigned to the Commerce Court on the 31st day of January, 1911, and that each one of these five transactions originated within a year then following and, so far as the evidence shows, were the first of their kind in which Judge Archbald had ever been engaged.

Observe, second, that not a single one of them, whether engaged in ostensibly for his profit or not, involved the expenditure on his part of a single dollar or the investment of a single penny. His sole contribution in each instance was his approach to the officers of the various companies or the hearing he obtained from them for others.

Observe, third, that in each instance the proposition did not originate with himself, but that he was approached by some third person who requested him to take up the matter with the railroad company; thus Edward J. Williams goes to him about the Katydid culm dump and induces him to approach Capt. May, Brownell, and Richardson, officers of the Erie Railroad Co. or its subsidiary, the Hillside Coal & Iron Co.; George M. Watson or some other person interests him in the settlement of the Marian Coal Co. and the sale of its assets to the Delaware, Lackawanna & Western Railroad Co., and thereupon Judge Archbald pursues beyond the point of importunity Loomis and Phillips and through them Rine and Truesdale. John Henry Jones, himself a man without financial responsibility, fixes his desires on the dump known as Packer No. 3, and at his suggestion Judge Archbald assumes the duty, again performed with vigor, of obtaining a lease on it from the Girard estate and inducing the consent thereto of the Lehigh Valley Coal Co., a subsidiary of the Lehigh Valley Railroad Co. His only connection with the proposition, in the language of the testimony, being for the purpose of obtaining a lease from the Lehigh Valley Coal Co., of seeing the Girard estate and Mr. Warriner. Frederick Warnke, having failed in person and by counsel to bend George F. Baer, president of the Philadelphia & Reading Railroad Co. and the Philadelphia & Reading Coal Co., and W. J. Richards, general manager of the latter company, to his will, induces Judge Archbald to approach Richards in his behalf, and afterwards pays to Judge Archbald $500 upon his purchase of certain property the title to which seemed open to attack on the part of the Pennsylvania Coal Co., a subsidiary of the Erie Railroad Co.; and lastly Edward J. Williams once more brings James R. Dainty and Judge Archbald together, and to Judge Archbald is once more assigned the duty of procuring, if possible, from the Lehigh Valley Coal Co. or S. D. Warriner, its vice president and general manager, a lease on a tract of land owned by that company and known as the Morris & Essex tract.

And, again, and in the fourth place, it will be noticed that in each one of these transactions Judge Archbald called upon these railroad companies to do something which prior to his intervention they had expressly refused or which was contrary to their fixed course of action, and which therefore required something more than normal effort. Thus we learn that May and Richardson had either refused outright or were indisposed to sell the Katydid dump until the respondent went to Richardson by way of Brownell. The Delaware, Lackawanna & Western Railroad Co. had not only rejected the claim of the Marian Coal Co. for damages, but was stoutly contesting it in the courts when the respondent joined Watson in the effort to force a settlement. The Lehigh Valley Coal Co. had definitely refused to lease to Madeira, Hill & Co. the banks known as Packers No. 2, No. 3, and No. 4 some time before the respondent asked it to assent to his acquiring Packer No. 3; and its general manager, Mr. Warriner, states that he had never known his company to sublease any land leased from the Girard estate except in this one instance to Judge Archbald. Richards and Baer had utterly rejected Warnke's request for the Lincoln culm dump, and only after other men had tried to help him and failed did Warnke urge Judge Archbald on them as his "last shot." And, finally, when the respondent once more approached Warriner to get from the Lehigh Valley Coal Co. the lease on the Morris & Essex tract for James R. Dainty he was promptly told—what undoubtedly he already knew—that it was not the policy of that company to lease or sell its coal lands.

In considering this chain of facts it must not for a moment be forgotten that Judge Archbald was a member of the Commerce Court and that the duties of that court are peculiar in that its business is restricted to a certain class of litigants, and that in that court is concentrated all the litigation of all the railroads of the United States engaged in interstate commerce having to do with the rates and facilities afforded by them to their shippers.

I do not mean to impugn the personal integrity of the officers of the railroads of this country, whether their names be mentioned in this proceeding or not, but I only state what every man knows to be true when I say that from the moment when Judge Archbald went upon the Commerce Court there was not a door closed against him in the office of any railroad in these United States, and not a reasonable request which he might make the refusal of which would not have been a source of embarrassment to the railroad officer to whom it was addressed. He knew this fact, if gifted with ordinary common sense. Beyond question Edward J. Williams knew it, John Henry Jones knew it, Frederick Warnke knew it, James R. Dainty knew it, and George M. Watson knew it. Can any man listen to this testimony without believing that there was a deliberate intent and purpose to utilize this situation?

In so far as the correspondence with Mr. Bruce is concerned, the respondent alleges that it was no more than an effort on his part to secure further light in a case about to be decided. No one will contend that a court may not utilize to the utmost the aid of counsel in solving his judicial doubts and difficulties, and that until final decision is rendered it is his right and, indeed, his duty to exhaust all the help which they can give him. The unfortunate part, however, of this correspondence is that no information of its progress or its contents was ever communicated to opposing counsel, and more remarkable still, not even communicated to his brother members of the court. So far as I know, it has been regarded from time immemorial as a gross indecency on the part of any court to solicit or accept suggestions, discussion, or argument from one party to a litigation in the absence or without the knowledge of the other. Every code of judicial ethics ever written has forbidden it, and if it did not, the common conscience of mankind would protest against it. No subtler poison can corrupt the streams of justice than that of private access to the judge.

Mr. President, all that was good in the feudal nobility was summed up in the two words of their deathless motto "noblesse oblige." They recognized that rank and station have their duties and obligations no less than their privileges. If this be true of those whose elevation springs from the mere accident of birth, how much more so of those whose title to office depends upon the esteem of their fellow citizens? How dare they for

one moment forget that with them always and everywhere "noblesse oblige"? No man can justly be considered fit for public office of whatever rank or kind who does not realize the double duty resting upon him—first, to administer his trust with unflinching honesty, and, second, and hardly less important, to so conduct himself that public confidence in his honesty shall remain unshaken. This confidence of the people in the integrity of their officers is the foundation stone, the prop, the support of all free government; without it constitutions and statutes are empty forms, executives, legislators, and judges the creatures of an ephemeral day. In forms of government only that which is best administered, in fact and in appearance as well, is best. A public man, it is true, may be as chaste as ice and as pure as snow and not escape suspicion. Try as he may, he can not always avoid the ready tongue of slander; but what he can do, ought to do, and must do is to avoid putting himself in any position to which suspicion can rightfully or reasonably or naturally attach. More can not be expected of him, but nothing less should be permitted.

If it be possible to discriminate in such matters, does it not seem that these obligations rest with peculiar force upon the judge? His life is to be spent as a peacemaker in adjusting the quarrels and difficulties of his fellows and in vindicating the right of society to peace and order. The appointing power or the electorate, as the case may be, his solemn oath, the State, society itself, all stand sponsor for his absolute honesty and strict impartiality. To preserve these virtues, therefore, both in essence and in seeming, should be his first and most especial care. He must realize that he has entered upon a career monastic in its requirements, not only of labor, but of abstinence and self-denial as well. Many things which he may have been accustomed to do, many things which in other men may be permitted or approved, or, if not approved, forgiven, are cut off for him from the moment when he dons his official robe, and many avenues of life are closed to him forever. The pursuit of fortune, the chase for wealth he must put behind him; and though he need not strip himself of all his worldly goods, nor cease to give a decent degree of care and thought to the preservation of such property as he may own, he must recognize that his period of accumulation, his active participation in commercial pursuits is over for the time. He has undertaken to content himself for this loss with the honors and emoluments springing from his position and the opportunities for service that it brings. His ideal must be that expressed by John Randolph, who said, in speaking of the great chancellor of Virginia, George Wythe, that—

he was in the world, yet not of the world, but was the mere incarnation of justice.

Who is there that will declare this rule too rigid or this ideal too high? If any such there be, at least even he must admit that the judge should scrupulously abstain from bargaining with litigants before him or from using the prestige of his lofty station as a means of procuring financial favors. If this were not so, think how many subtle byways of approach and influence would be opened; how quickly and surely litigants would trace the outcome of their causes to something other than a fair application of the maxims of the law; how easily a gift might be concealed under the guise of a trade opportunity; and how restless would be the suitor when compelled to submit his cause for adjudication to the favored friend or business ally of his adversary. Indeed, since judges at their best are merely human, how far might the poise and balance of their judgments be thus disturbed by a bias and a prepossession not confessed even to themselves? The mere suggestion of these things is enough. If emphasis were needed, we might content ourselves with recalling the famous but universally condemned defense of Lord Bacon, who admitted the receipt of gifts from suitors, but denied that his judgment had been adversely influenced thereby.

Measured by these standards the conduct of this respondent is indefensible indeed. There is little need to emphasize the situation by analogies; but if a member of the Interstate Commerce Commission were found to be engaged in trafficking with railroad companies for their properties; if a member of the new Court of Customs Appeals were found either in person or by his runners to be hunting bargains from importers on the New York docks, there would be none to defend him. All men will unite in regretting the necessity for action in the case at bar, but the duty of the Senate, we submit, is perfectly clear.

Mr. SIMPSON. Mr. President——

Mr. JONES. I suggest the absence of a quorum.

The PRESIDENT pro tempore. The Senator from Washington suggests the absence of a quorum. The Secretary will call the roll.

The Secretary called the roll, and the following Senators answered to their names:

Ashurst	Crane	Kern	Shively
Bacon	Cullom	Lippitt	Simmons
Bankhead	Cummins	Lodge	Smith, Ariz.
Bourne	Curtis	McLean	Smith, Ga.
Bradley	Dillingham	Martine, N. J.	Smith, Md.
Brandegee	Dixon	Oliver	Smoot
Bristow	du Pont	Page	Stephenson
Brown	Fletcher	Paynter	Stone
Bryan	Foster	Penrose	Sutherland
Burnham	Gallinger	Perkins	Thornton
Burton	Gronna	Perky	Tillman
Chamberlain	Johnson, Me.	Pomerene	Townsend
Clapp	Jones	Richardson	
Clark, Wyo.	Kenyon	Root	

The PRESIDENT pro tempore. On a call of the roll of the Senate 54 Senators have responded to their names. A quorum of the Senate is present.

Mr. NELSON. Mr. President, I desire to have my name recorded.

The PRESIDENT pro tempore. The Senator's name can not now be recorded, but the fact that he has addressed the Chair shows that he is present.

ARGUMENT OF MR. SIMPSON OF COUNSEL FOR RESPONDENT.

Mr. SIMPSON. Mr. President, in the early days of this trial day by day one or more Senators appeared and took the oath of office for Senators who were to sit upon impeachment trials. That oath states that each Senator shall, "in all things appertaining" to this trial, "do impartial justice, according to the Constitution and laws." I take it that those words, "in all things," necessarily mean that the respondent shall be fairly advised of what the charges are against him; that the evidence shall be limited to those charges; and that the judgment which is passed upon those charges, when that time comes, shall be passed upon them, each charge by itself, according to the evidence which relates to that charge, and to that charge alone. If it does not mean that, it is a little difficult to understand what it does mean.

Upon most of those points counsel for the respondent and the managers agree. We disagree slightly as to whether the first of the things I have suggested has been thoroughly met by articles 6 and 13, but inasmuch as those two articles are in the keeping of my senior colleague, Mr. Worthington, I shall not dwell upon that point.

There is, however, in that oath one other thing that I want to dwell upon, because it is really at the root of the whole of the charges; and that is, that to this respondent "impartial justice" is to be done, "according to the Constitution and laws." What laws are there referred to? Necessarily, I take it, it must be the laws of the United States, yet I do not recall having heard during the four arguments of yesterday and to-day any particular reference to the laws of the United States.

It was suggested by several of the managers yesterday that a violation of section 132 of the Judicial Code might have been charged in some of these articles, but it was admitted in the same breath that there was no charge under that section, which relates only to bribery, and it is, of course, admitted that you can not convict this respondent on a charge of bribery when he is not charged with bribery.

It is evident that the managers felt the difficulty of their position in that regard, for when Mr. Manager STERLING made his argument yesterday, in order to avoid just that difficulty, he used this language, which I prefer to read, so that there may be no mistaking his exact meaning. I am reading from page 1345:

And so, Mr. President, I say, that outside of the language of the Constitution which I quoted there is no law which binds the Senate in this case to-day except that law which is prescribed by their own conscience, and on that, and on that alone, must depend the result of this trial. Each Senator must fix his own standard; and the result of this trial depends upon whether or not these offenses we have charged against Judge Archbald come within the law laid down by the conscience of each Senator for himself.

Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors," if there is no law to govern you and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him. You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him, if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.

I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good-behavior" clause of

the Constitution or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say that this respondent has violated that thing, or you must under your oaths of office say that he shall go free.

Nay, there is more than that in this. Judge Curtis, one of the ablest lawyers this country has ever known, met just that claim in the trial of the President. In those days of excitement one wonders not that such a position was maintained. I do wonder that at this day, in the quiet of this Senate Chamber, when men are supposed to be viewing this matter in a judicial capacity, when there is no political excitement to distract them from the performance of their duty, that such a position should be taken. But when it came before the Senate in the trial of Andrew Johnson, this is what Judge Curtis said. I may be pardoned for reading it, as probably no man could better say it than he:

> But the argument does not rest mainly, I think, upon the provisions of the Constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibitions of the Constitution. "Congress shall pass no bill of attainder or ex post facto law." According to that prohibition of the Constitution, if every Member of this body, sitting in its legislative capacity, and every Member of the other body, sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of Members of that body? As a Congress you can not create a law to punish these acts if no law existed at the time they were done; but sitting here as judges, not only after the fact but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case.

That is his quotation of what was claimed in the Johnson case, just as Mr. Manager STERLING claims it here.

Then Judge Curtis goes on:

> According to this assumption the same Constitution which has made it a bill of rights of the American citizen, not only as against Congress but as against the legislature of every State in the Union, that no ex post facto law shall be passed—this same Constitution has erected you into a body and empowered everyone of you to say aut inveniam aut faciam viam—if I can not find a law I will make one. Nay, it has clothed everyone of you with imperial power; it has enabled you to say, sic volo sic jubeo stat pro ratione voluntas—I am a law unto myself, by which law I shall govern this case.

And that is the position which Mr. Manager STERLING, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's, to evolve a law which shall apply to this case, and which, when this case is over, shall cease ever thereafter to be the law. And that is said to men who are here trying a case according to law. In sooth, I would rather quote as the true guide for your deliberations what Mr. Manager Buchanan, afterwards President Buchanan, said on the trial of Judge Peck, when he said:

> I freely admit that we are bound to prove that the respondent has violated some known law of the land.

That is the claim which the respondent's counsel make here as antagonistic to the lawless claim of the managers as above quoted.

Turning now to the Constitution—and I am not going to go at great length into this, because my senior colleague is the one who prepared the brief upon this particular point and who is entitled to all the honor and credit for it and will deal with it himself when his turn comes, and hence I shall only deal with it partially—but turning to it for the purpose of partially dealing with it, let us see where we land ourselves when the Constitution is taken into consideration. It needs no panegyric here. The managers might have saved themselves the trouble of praising it up to the seventh heaven. But in this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to vivify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point. One of them, you may remember, came up in the Andrew Johnson impeachment. Another one I will refer to in a little while.

But it is said that in this case you do not need any statute; you have the provision of the Constitution which says that judges shall hold their offices during good behavior. Now, I want to know what good behavior means. This is the provision:

> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.

If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that. I am not challenging that position; but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.

I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the king. Then the barons wrested from the king his power of dismissal, and required that there should be a good-behavior tenure rather than a tenure at the pleasure of the king, subject at that time only to the power of impeachment. And then a little later—I think it was in 1701, after the revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment.

Mr. WORTHINGTON. Without a trial.

Mr. SIMPSON. Without a trial. Those are the circumstances under which the good-behavior tenure came into existence.

But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile, he may violate the speed laws and be haled before some magistrate and fined.

Is he to be removed from office because of that? No one would answer "Yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good-behavior clause at all.

The argument that grows out of the claim that a violation of the good-behavior clause is sufficient justification for an impeachment is as clearly reasoning in a circle as anybody can well imagine. Concede that good behavior is the tenure, still you can not remove a man from office, under the Constitution, unless he is guilty of "treason, bribery, or other high crimes and misdemeanors," and hence the determinative factor as to whether or not a judge was of good behavior is whether or not he was guilty of "treason, bribery, or other high crimes and misdemeanors." And so you may go round in a circle and get nowhere except where you started.

Now, one thing must certainly be evident in this matter. It was claimed by the managers yesterday, and partially by Mr. Manager HOWLAND to-day, that the words "high crimes and misdemeanors" as used in this provision of the Constitution were taken bodily out of the English practice, the English parliamentary law, as they said. That is unquestionably true. It is not true that in all the impeachments in England they used the words "high crimes and misdemeanors," but those words are used in a number of their impeachments. This being so, you must either accept the construction placed upon those words in the lex parliamenti, or you must decline to accept that construction. If you decline to accept it, of course that branch of the argument falls by the wayside at once. But if you accept it, then the question arises, which of the English precedents are you going to accept, in view of the fact that some hold that an impeachable offense need not be an indictable one, and others hold a precisely anagonistic view. Are you going back to the days when a man was impeached simply because he happened to have been put in office by those who have themselves just been turned out? If that is the view you are going to accept, then, perhaps, every four years in this country there will be a wholesale slaughter. But if you are going to accept the best precedents which appear upon the English reports, and especially those down near to the time when the Constitution of the United States was adopted, then, as is shown in the brief, and as I have no doubt Mr. Worthington will refer you to, those best precedents show that except for an indictable offense no impeachment would lie under the laws of England.

But what are you going to do if you take the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors" in that clause must be taken either in the technical sense or in the popular sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors" you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

I have infringed somewhat probably, Mr. Worthington, on your copyright, I admit, in touching this question, but there is one other thing I want to refer to before I leave it. Mr. HOWLAND referred yesterday to the impeachment of Alexander Addison, and as he thereby trespassed upon my bailiwick I prefer to deal with that case rather than to leave Mr. Worthington to deal with it.

Mr. WORTHINGTON. Go ahead, sir.

Mr. SIMPSON. Alexander Addison was impeached. He was impeached shortly after Jefferson became President. I do not need to recall to this assembly what the condition of the public mind was at that time as between the then Republicans, represented by Jefferson, and the Federalists, who had gone out of power.

It is true, as Mr. HOWLAND stated, that the attorney general of the State presented to the supreme court a request for leave to submit to the grand jury an information against Alexander Addison. It is not accurate to state that the supreme court said that the charge against him was not an indictable offense. What the supreme court did say to the attorney general was this:

Inasmuch as the affidavit which you have presented to us does not charge either willfulness or malice against Judge Addison, it is insufficient to charge an indictable offense. If you amend it by charging willfulness and malice, then there will be a misbehavior in office charged, and that is indictable.

But those in power did not choose to amend it. Having control of both branches of the legislature of my State, they preferred to proceed by way of impeachment, and they impeached Judge Addison and he appeared. Did he say that the charges against him were not indictable? On the contrary, although he tried his own case from beginning to end, he started out and stoutly maintained throughout the proceeding that the charge was an indictable charge, and the record of the case which Mr. Manager HOWLAND had shows it most clearly.

Instead, therefore, of that case being a precedent for the position that an offense may be impeachable which is not indictable, it is the precise reverse of that; for, as stated, the respondent himself boldly admitted that the offense with which he was charged was indictable, and therefore was impeachable.

Let me ask this upon conclusion on this point of the case: Suppose that among the various suggested amendments to the Constitution of the United States some one would come along, in view of the position taken in a few places at least in our country, and ask for and succeed in obtaining an amendment which would fix a term of years for each judge. Instead of holding during good behavior, they would hold then for 10 or 20 or 30 or any number of years that you choose. Does anybody pretend, can anybody pretend, that the duties of the judge would be altered in the slightest degree? Would there not be required of him the same good behavior and could he not be impeached for the same lack of good behavior or indulgence in bad behavior, or whatever you choose to call it, just the same as he can now when there is a term of office during good behavior? If that is so, and certainly no one will say that the duty of a judge would change by reason of such an amendment as that, then, as heretofore claimed in this argument, the good-behavior clause has nothing whatever to do with the question of impeachment.

I pass from the point, perhaps having dwelt longer upon it than my time justifies, and inquire what is the law which, under the oaths of office of Senators, they are bound to apply to a large number, at least, of the articles of this impeachment? I heard it said yesterday, "Why, the facts are admitted in relation to Judge Archbald." Yes; a good many of the facts are admitted; but the question whether the facts are or are not admitted plays but the slightest conceivable part in this determination of this case. Is there in the answer any admitted fact upon which criminality can be founded? Is there in that answer any admitted fact or series of facts upon which a violation of law can be stated? Not in the slightest degree.

It is said, "Why, he purchased culm dumps and prepared to engage in the business of washing the coal in the Katydid and in Packer No. 3," and so on. Yes, he did. He admits that. Is that a crime?

Away back in 1812 Congress passed the only act of which I have any knowledge which bears even in the slightest degree on the question of the duties of a judge outside of the time when he is sitting for the performance of his judicial duties. That provision is now in section 713 of the Revised Statutes, and it reads thus:

SEC. 713. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

There you have written into your statute books that engaging in the practice of law while a judge shall be a high misdemeanor, and of course that would bring the case within the impeachment clause of the Constitution I have so often quoted. But the very fact that you do not say of a judge that he shall not engage in any other business necessarily implies, under the doctrine expressio unius, est exclusio alterius, that Congress has not yet seen fit to say that a judge shall not engage in any other business so long as he is judge; and until you see fit to say that he has the right to carry on any business, provided only he carries it on as you or I or anybody else would carry it on, in a decent and honest manner.

It was suggested yesterday that out of this trial there might grow a statute upon that point. I would welcome such a satute. If there is a doubt to-day in the public mind, or in the mind of any single Senator on this floor, that judges ought to be prohibited from carrying on any business, I would welcome the passage of such a statute, so that it might be known definitely by every judge on the Federal bench what he may and what he may not do. If, after that, after you have told him what he may not do, he willfully disobeys, then rightfully may he be impeached; but until that time comes, I submit that the only thing you ought to do or that the Congress ought to do is what was done after the trial of Judge Peck, when he was acquitted of the charge made against him. Then it was that Congress, in 1831, I think it was, passed the act in relation to contempts, which remains upon the statute books until to-day. Give us something definite, something certain, in regard to this matter; otherwise you are convicting a man, as Judge Curtis said, by an ex post facto law, and you are, as by a bill of attainder, taking from him his office without ever having theretofore told him that he should not do that which you are convicting him for doing.

There is another point in this same connection upon which I want to dwell a little while before I come to the evidence in the case. I have repeatedly said that the Senate is sitting here as a court. I am not going into the much controverted question which has arisen from time to time, and which was such a bugbear during the trial of the President, as to whether it ought to be called a high court of impeachment or only a Senate.

The question, however, is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to *try* all impeachments." It says, "When the President of the United States is *tried* the Chief Justice shall preside; and no person shall be *convicted* without the concurrence of two-thirds of the Members present." It says, "*Judgment* in cases of impeachment shall not extend further than to removal from office," and so on, "but the party *convicted* shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "The President * * * shall have power to grant reprieves and pardons for *offenses* against the United States, except in cases of impeachment," and Article III, section 2, lastly says "The trial of all *crimes*, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said *crime* shall have been committed."

Now, I want to ask if it is possible to use words more clearly demonstrative that that which you as Senators are doing you are doing in a judicial capacity. That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Prof.

Dwight in Sixth American Law Register (n. s.), pages 258 and 259:

When a criminal act has been committed it may evidently be regarded in three aspects—first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or "the people," as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire Nation by a proceeding called an impeachment. In process of time the injury to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings—indictment and impeachment.

Mr. Manager CLAYTON, when reference was made to that quotation in a very early stage of this trial, said that many of the things which Prof. Dwight referred to had not been sustained by the adjudications of this body. That I do not care to go into. It is immaterial for the thought which I wish to present. Certain it is, however, that that historical statement, thus briefly presented, has never been controverted by anybody and can not successfully be, for it is part of the judicial history of England.

Indeed, when the managers were preparing their brief in this case they unwittingly said some of the things which I wish to quote to you now as bearing out exactly the thought that I want to present. I am reading from pages 6 and 7 of the brief, particularly in the quotations from Tucker on the Constitution. He says this:

(*f*) The word "maladministration," which Mr. Mason originally proposed and which he displaced because of its vagueness for the words "other high crimes and misdemeanors," was intended to embrace all official delinquency or maladministration by an officer of the Government where it was criminal; that is, where the act done was done with willful purpose to violate public duty. There can be no crime in an act where it is done through inadvertence or mistake, or from misjudgment. Where it is a willful and purposed violation of duty it is criminal.

In another place:

So, if he omits a judicial duty, as well as when he commits a violation of duty, he is guilty of crime or misdemeanor; for, says Blackstone, "crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it."

* * * * * * *

And again:

It must be criminal misbehavior—a purposed defiance of official duty—to disqualify the man from holding office, or disable him from ever after holding office, which constitute the penalty upon conviction under the impeachment process.

I claim no more than that for the purpose of my argument in this case.

So, when they came to quote from Foster on the Constitution, unhappily they left out the vital clause in the extract which they undertook to make. It was most convenient to substitute asterisks for that vital clause, but I prefer to read the whole of the paragraph, including the vital clause and leaving out the asterisks. As it is quoted in that brief, these are the words:

The term "high crimes and misdemeanors" has no significance in the common law concerning crimes subject to indictment. It can be found only in the law of Parliament and is the technical term which has been used by the Commons at the bar of the Lords for centuries before the existence of the United States.

Then come the asterisks. These are the words which the asterisks displace:

But the judgments of the Senate of the United States in the cases of Chase and Peck, as well as those of the State senates in the different cases which have been before them, have established the rule that no officer should be impeached for any act that does not have, at least, the characteristics of a crime, and public opinion must be irremediably debauched by party spirit before it will sanction any other course.

That is the law as I understand it, and I pass therefore from it. It is a rule of law founded on legal principles, applied not only in impeachment cases, but in every other class of cases that ever comes before a court. At the very basis of all constructions, whether of constitution or of statutes or of contracts, is the maxim noscitur à sociis, which says neither more nor less than that words are to be taken in their meaning in conjunction with the other words with which they are, in fact, associated. It has found this construction so many times that it is perhaps only necessary for me to refer to one more set of cases in order to put the point clearly in the minds of the Senate.

In the various turnpike cases, when they were more flourishing in the earlier days, it was quite common to say that the turnpike company should have the right to charge toll for all carriages, wagons, carts, and other vehicles which used the turnpike, and also they might charge toll for all horses, cattle, hogs, and other animals which used the turnpike. But it was held without exception in every case that I ever heard tell of that the words "other vehicles" did not, for instance, cover baby carriages, though they were vehicles just as well as the others; and that the word "animals" did not cover man, though he is an animal just as much as a horse or a steer, and perhaps quite as much of a hog sometimes as the ones that pay toll when they travel along the turnpike.

The point is that general words, like the word "misdemeanor" in this case, are to be construed in accordance with the words which precede; and under the constitutional provision that is particularly emphasized by the use of the word "other" in the phrase "treason, bribery, or other high crimes and misdemeanors."

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court, then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here, and among those rules which are down at the very foundation of Anglo-Saxon jurisprudence are those which relate to the effect of character evidence, to the effect of the reasonable-doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during a trial. I prefer for a convenient purpose to treat of the question of the admissions made during the trial first. When we were introducing the character evidence in this case Mr. Manager CLAYTON rose and said this——

Mr. CLAYTON. On what page?

Mr. SIMPSON. On page 888:

I may say, Mr. President, in the beginning, that we have not controverted the good character of Judge Archbald. Perhaps if we had controverted that a larger range would be permissible for the respondent in reply to that controversy raised by the managers. But the managers have not raised that question.

Again, on page 889:

We have not charged that while actually sitting on the bench Judge Archbald was guilty of these several misbehaviors. We have charged misbehaviors when he was not sitting on the bench. The whole case is his behavior aside from the discharge of his mere official duties while actually sitting.

Again, on page 889:

Mr. President, I do not think it necessary to detain the Senate longer. I insist that inasmuch as his good character is not controverted this range of examination sought here by the counsel is not permissible.

Again—I read from page 915:

So, Mr. President, I respectfully submit to you and to the Senate that after these gentlemen have examined 10 witnesses on character and when the testimony of those character witnesses is not disputed—is not controverted—and when the managers tell the Senate it will not be controverted, it seems to me that the further examination of character witnesses might well be dispensed with.

It was in recognition of that fact—that is, the evidence relating to the character witnesses—that this body passed its order that 15 character witnesses should be the limit. A little later on in the examination, on page 891, this question was asked:

Q. Now, Maj. Warren, I want to ask you to tell us, from your long acquaintance with Judge Archbald and your observation of him as a judge, what were his principal characteristics as a judge as to integrity, ability, and industry.

Objection was made to that, and your Presiding Officer in sustaining the objection said, on page 892:

This particular question is as to the opinion of the witness himself. If the counsel would limit his question to the witness's knowledge of the general character of the respondent for judicial integrity, the Chair would think that was competent; but this question not only asks the individual opinion of the witness, leaving aside the question of general reputation, but it goes further and asks for the opinion of the witness, not only as to integrity, but as to ability and industry, none of which characteristics or features are involved, as the Chair understands, in any issue before the Senate at this time.

And the managers sat here and did not raise any point touching that ruling of the Chair, which was in fact made on their objection, so that they stand to-day estopped by their silence from denying Judge Archbald's judicial integrity, or his individual integrity, or his ability, or his industry. Those facts must stand throughout this trial as admitted facts, not relating to one article but to every article in the case.

One other reading and I shall have passed from that which I want to read in regard to this point. I am reading from page 905. When Judge Gray was upon the witness stand I asked him this question:

Q. Will you please tell us what is his reputation for integrity and impartiality as a judge, if you know?

That was objected to, and the Presiding Officer said this, on page 906:

The PRESIDING OFFICER. The Chair thinks, however, that the question transcends the limitation. The witness is asked the question as to his impartiality. The Chair thinks it ought to be limited as to his reputation for integrity as a judge.

And again the managers sat silent.

We have therefore as admitted facts, I may say, certainly, undisputed facts in this case, that Judge Archbald is a man whose integrity is unquestioned, whose judicial integrity is unquestioned, whose industry, whose ability, whose impartiality

are all unquestioned; and those elements are necessarily vital in determining the truth or falsity of the charges which are here made against him.

Let us see how far they go as determined by the Supreme Court of the United States. I prefer to limit my quotations to the judgments of that tribunal, not only because it stands highest in the land, but because it is the best exponent on Federal questions.

In the case of Kirby *v.* The United States (174 U. S., 47), this was said:

> The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. "This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

In Coffin versus United States, One hundred and fifty-sixth United States Reports, I read from page 460. This is said in the opinion written by the present Chief Justice:

> Concluding, then, that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf, let us consider what is "reasonable doubt." It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted.

Skipping a portion, I read now from page 461:

> Whether thus confining them to "the proofs," and only to the proofs, would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. "The proofs and the proofs only" confined them to those matters which were admitted to their consideration by the court, and among those elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.

Again, from Edgington *v.* United States (164 U. S., p. 365), I read this:

> It is impossible, we think, to read the charge without perceiving that the leading thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. He stated that such evidence "is of value in conflicting cases," and that if the mind of the jury "hesitates on any point as to the guilt of the defendant, then you have the right and should consider the testimony given as to his good character."
>
> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Now, if those principles are applied to the admissions as to good character, as to industry, as to integrity, and as to impartiality, I ask what, then, is the conclusion which the Senate ought to reach in regard to considering the evidence in the case?

Perhaps before passing, however, to that evidence I ought to refer somewhat briefly, as I must, but none the less in order to disabuse the minds of the Senate of any lodgment which may have been found in it by reason of the case of the Amity Coal Co., which was called to the attention of Mr. Willard when he was upon the witness stand, and to Judge Gray likewise, so that you may know that that which was said by the Supreme Court of Pennsylvania casts, in fact, no reflection upon Judge Archbald. We have in our State a statute providing for the formation of joint-stock associations. Like most of those statutes they are a delusion and a snare to anybody who tries to form an association under them. If you fail to dot an "i" or to cross a "t" you are almost certain to find yourself in a position where you will pay the penalty in any suit that happens to be brought against you individually. In this particular case the statute provided, among other things, that the certificate should state "the amount of capital stock of the said association subscribed by each subscriber, the total amount of the capital, and when and how to be paid."

Judge Archbald, before he became a judge at all, in drawing the articles of association for himself and his associates when they formed the Amity Coal Co., did not pay in anything. They construed that statute to mean, when it says "when and how to be paid," that there was not any necessity at the time to pay in anything. That view of the law was taken by the judge of the lower court when the case came before him for consideration. It went to the upper court, the supreme court of the State, and they said that that was not a proper construction of it, and this though every dollar of the capital had in fact been paid in in the interim and a great many thousands of dollars besides. But because in the inception of the thing there had not been a payment in of money, which the court thought by analogy under the corporation act ought to be at least 10 per cent of the amount of capital subscribed, therefore, there was held to be a personal liability in that case, but the court was most careful to say—I am now quoting from the opinion on page 899:

> In saying this we do not impute an intention to defraud or reflect upon the motives of the gentlemen by whom the Amity Coal Co. was organized. They may have supposed themselves to be complying with the provisions of the act. Our business is not with their motives, but with what they did; and our inquiry is whether this association was organized in accordance with the fair interpretation of the act of 1874.

And because of that construction they held it was not; and yet two of the ablest judges of that court—I mean of the Supreme Court—agreeing with the judgment of the judges of the court below, dissented from that conclusion. Now, I ask the Senate, can it be that because Judge Archbald drew the articles which, in the judgment of two of the upper judges of the Supreme Court and all of the judges of the lower court, were in exact compliance with the law, that he is to be held guilty of any moral wrong because in fact the upper court thought that it was not in compliance with the law, and that, too, in face of the fact that the upper court said that they did not mean in any way to reflect upon him? If that is so, I want to know how many of the 60 lawyer Members of this Senate would always find themselves safe from just such a reflection as that. If a man, whether a lawyer or no, is bound to be held to be immoral because he makes a mistake in the law, then the lawyers are in as sad a plight as were the lawyers in the early days of my Commonwealth, when the Quakers there refused to permit any lawyers to dwell therein.

Now, let us see what is the result of the matter so far presented. We have a man admittedly of high character; we have a man whose judicial integrity is not challenged; we have a man who, it is admitted, is impartial in all that which he has done, who is able and who is industrious, and you are asked, notwithstanding those admitted facts, to find that he has been guilty of wrongdoing.

You get down, therefore, just to this position: You are asked to say that because of suspicion this man is to be convicted of a wrong and excluded from office, though it is an admitted fact that there was nothing done which was wrong at all; in other words, the suspicion of wrong is to control the fact that there was no wrong in this case. Even in the palmiest days of impeachment, under the English practice, no case can be found in which such admissions appear upon the record of an impeachment trial.

I pass, Senators, from the law and carry myself to the facts in the case. I desire to say that my senior colleague will look after article No. 1, article No. 3, article No. 6, and article No. 13. The other charges are the ones which I am to take care of as best I may in this argument before you.

Article 2 charges that Judge Archbald, while a judge of the Commerce Court, undertook to effect a settlement between the Marian Coal Co. and the Delaware, Lackawanna & Western Railroad Co.; that the Delaware, Lackawanna & Western Railroad Co. was a litigant in the court over which he was a judge; that he undertook to do that for a consideration; that, by various conversations and correspondence, he undertook to use his influence as a judge for that consideration to bring to pass a settlement; and that, by reason of those acts, he is guilty of a high crime and misdemeanor.

You will observe in the answer he admits that he did try to effect the settlement. He admits that he did that because of his friendship for Mr. Watson and for Mr. C. G. Boland; but he denies everything which undertakes to import to that which he did either criminality or any breach of good manners or propriety. The issues which you are called upon, therefore, to consider is whether or not an impeachable offense is charged—as to which I have said all that I desire to say—whether or not Judge Archbald, for a consideration, undertook to effect that settlement; whether or not what is commonly spoken of here as the Lighterage case was in any real sense pending in his court at the time he undertook to effect that settlement, and, if it was, what the effect was; whether or not he corruptly used his influence as a judge and whether or not what he did constituted a high misdemeanor in office.

The first question, of course, is whether he undertook to do that for a consideration. The managers once or twice during the trial and once or twice yesterday said that they did not think that the question as to whether or not he undertook to do it for a consideration moving to himself was a material ques-

tion, but by innuendo they still insist, to use the language of Mr. Manager STERLING, that they believe that he did.

I agree with them that the question as to whether or not he was to do this for a consideration moving to himself is immaterial in this sense; that is to say, if he undertook to effect that settlement for a consideration moving to his friend it would be just as much a crime and a wrong, if it was done corruptly, as it would have been if it had been done for a consideration moving to himself; but there must inhere in it corruption, otherwise there is no crime and no wrong in relation to it. That is the point as to which this evidence becomes important.

The only evidence as to whether or not he did undertake for a consideration to do anything rests in the statement of Mr. C. G. Boland. When Mr. C. G. Boland was recalled as a witness to testify as to this point, the Senate will remember that there was quite an extended argument, and, by a comparatively small vote, the objection of the respondent's counsel was overruled. The question was then put—and I will read the question and answer:

Q. Now, go ahead and state what he said about that.—A. He said that as the judge was assisting him in the matter he felt that he ought to be compensated, and that he proposed to compensate him by one-fourth of the amount he was to receive in excess of $95,000, which was the price it was to net to us.

That is found on page 720. That is to say—so that it may have the fullest effect that can be given to it—Mr. C. G. Boland said that Mr. Watson said that he, Mr. Watson, thought the judge ought to be compensated, and that he, Mr. Watson, proposed to compensate him. That, you will remember, Mr. Boland testified, was said when he and Mr. Watson were alone. He further said it was never communicated to the judge at any time or under any circumstances; and I want to ask the Senate whether or not they can find a man guilty of a charge like that upon a double hearsay statement never carried to the man who is to be charged?

But that question is only a very small part of the answer to it. Mr. Watson, whose testimony you have not heard read, denies that anything like that was said. I shall have, therefore, to detain you long enough to read a portion of that testimony. I read from pages 1141 and 1142:

Mr. WORTHINGTON. One thing, there has been some testimony here in relation to you that I have not heard you asked about, and that is about a division of the difference between one hundred thousand and a hundred and sixty thousand dollars into fours. Have you read the testimony on that subject?

Mr. WATSON. Yes.

Mr. WORTHINGTON. What have you to say about it, Mr. Watson?

Mr. WATSON. I never heard that until I read it.

Mr. WORTHINGTON. Had there been any suggestion by anybody, while the negotiations were going on, that Mr. Phillips or Mr. Loomis should participate in what was to be paid?

Mr. WATSON. Absolutely not.

Mr. WORTHINGTON. Was there any suggestion at any time that Judge Archbald should receive anything in any way as compensation for what he did in this matter?

Mr. WATSON. Not to me; I never heard of it.

Mr. WORTHINGTON. Was there anything said about that by anybody, to your knowledge?

Mr. WATSON. No; I do not know anything about that. Only two people that I ever heard was to get any money out of this, and one was Reynolds and one was me. That is all I ever heard of.

I will not stop here to read the judge's testimony denying that same statement, because it must be very fresh in your own minds. I submit that, with the two disputing it and Mr. Boland not undertaking to assert it of his own knowledge, but only that somebody else said it, you can draw no conclusion antagonistic to the judge. But the case is infinitely stronger than that. The same Mr. Boland, who says that Watson told him that thing, testified thus before Mr. Wrisley Brown:

Mr. BROWN. Did Watson give you any intimation of what was to become of this large excess over the $100,000?

C. G. BOLAND. No.

Mr. BROWN. You did not concern yourself about it?

C. G. BOLAND. No.

And when he was asked to explain before the Senate why it was that he made that statement to Mr. Wrisley Brown, which he now says is a lie, he said that he did not want to be drawn into the matter because Mr. Watson made that statement also regarding Mr. Loomis and Mr. Phillips, and that he had no proof that it was true. When he was put upon the stand here to testify in regard to it, he said that in the testimony he gave here he did not give the names of Mr. Phillips and Mr. Loomis, because he did not believe there was any agreement or understanding ever made that they were to get any part of that money, and yet the same thing was said about them that was said about Judge Archbald. He chooses to retail the same slander, said by a man he does not believe, against Judge Archbald in this case, though refusing to give it as against others charged by the same man at the same time, and the reason he does this I leave you to guess. So it is otherwise throughout the testimony of Mr. Boland. He says in another place that he knows nothing affecting the integrity of Judge Archbald except that which may be drawn out in relation to the $500 note which was brought to him—C. G. Boland—for discount, and he repeats that in two or three different ways. He makes no explanation of why he said that thing if it was not true, and yet the managers ask you, by innuendo, to believe that Judge Archbald was guilty of a wrong because of a statement of a man like that, who himself admits in your presence that he told an untruth about it at least three times.

I pass, Senators, away from the question of consideration. What was in fact—and this is the second point at issue under these pleadings—what was in fact the situation in relation to the Lighterage case? And, by the way, I may say here if any reference I make to the evidence in this argument is doubted by any Senator, or is challenged in any way, I shall be glad to have my attention called to it, because I have here a memorandum of the pages of the testimony covering every one of these points.

What is the true position with relation to the Lighterage case? It is true that technically that case was pending in the Commerce Court, and I may as well at the same time deal with the Fuel Rate case, though it only appertains to article No. 1, which Mr. Worthington has in charge. It is true that that case also technically was pending in the Commerce Court at the time these negotiations were carried on, but both cases were only technically pending there. I want to put that broadly, so that when Mr. Manager CLAYTON comes to reply to the argument which I am this day making he may challenge that in some way, if he chooses so to do. Both of those cases had been decided in the month of May preceding the August when these negotiations commenced. It is true they were both decided on motions for preliminary injunction and that in the month of June both of those cases had been appealed to the Supreme Court of the United States; but those cases both raised questions of law on undisputed facts, and the records, which were offered in your presence on Tuesday, show that beyond the peradventure of a doubt.

In the Fuel Rate case—I am not going into the facts in regard to the case, for it is wholly unnecessary to do so—the Commerce Court granted a special injunction, and the case went to the Supreme Court, which reversed the court below and entered an order that the record should be remitted to the Commerce Court with instructions to dismiss the petition.

Everybody supposed the case was at an end, so far as the Commerce Court was concerned, when it was appealed to the Supreme Court, and that it only had to be reviewed on its law in the Supreme Court, and the Supreme Court agreed to that view and entered the order that I have stated. When the Lighterage case went to the Supreme Court, the Supreme Court affirmed the judgment of the Commerce Court and sent the case back for further hearing. When it came back, both the counsel for the United States and the counsel for the Interstate Commerce Commission withdrew their answers, asked leave of the Commerce Court to present motions to dismiss, and elected to stand upon the motions to dismiss, thereby establishing that the facts averred in the petition were true and that there was nothing else to be considered but the law as applicable to those facts.

The opinion of Judge Carland, which is also upon this record, rendered after these proceedings commenced, and when Judge Archbald did not sit at all, states the facts just as I have stated them to you; and the Commerce Court, Judge Archbald not being present, as a matter of law, affirmed their prior ruling that the Lighterage case was properly decided theretofore. So you see that it is only in the most technical sense possible that the Delaware, Lackawanna & Western Railroad Co. had any cases then pending in the Commerce Court.

I thought I had stated, but my colleague thinks I did not, that the Lighterage case went up to the Supreme Court and was affirmed and came back again. Both cases went up at the same date, in June, 1911.

The next and the only other point in this article is the question as to whether or not Judge Archbald used his influence as a judge to assist in that settlement. He says he did not and, of course, nobody contradicts him. It is quite true, as the managers say, that it is a practical impossibility for a prosecuting officer to get into the mind of a man, and that he can only reach out by circumstantial evidence to establish such a fact. That I quite agree to, but the managers can not establish a fact by circumstantial evidence unless the circumstantial evidence, with at least reasonable certainty, moves to the establishment of the fact; and that is not the situation here.

One would have supposed from the arguments which were presented to you yesterday upon that point that Judge Archbald,

or perhaps Mr. Watson, or both, were the ones who instituted the thought of making that settlement; but that is not so. I repeat that it is not so, because there are upon this record three letters offered in evidence by the managers, showing attempts to settle before Mr. Watson was even consulted, in which letters the fact is referred to that Mr. Reynolds, who was the other counsel for the Bolands, was the party being considered in connection with the question of settlement up to that time, and neither Watson nor Judge Archbald had anything whatever to do with it. But Reynolds, for some reason not necessary to consider, was not a success in bringing about a settlement; and, as Mr. C. G. Boland himself said, he feared that, unless something was done, they would lose their property, and so—it may be at the suggestion of Mr. Williams, but, at any rate, they went to Watson to get him to see if he could not effect a settlement.

What Watson does before he sees Judge Archbald I neither know nor care. He goes to Judge Archbald to see if he can not get an introduction to Mr. Loomis, who had been a neighbor of Judge Archbald in Scranton for a number of years. He gets his introduction and then the negotiations commence. There were various interviews. It is quite unnecessary to consider how many nor when they took place, but they all occurred on or after August 22, 1911. There were various interviews which Mr. Watson had with various officers of this railroad company, but he did not get very far, as they were so largely at variance in regard to the figures. He was not willing to come down far enough, nor were they willing to go up high enough, to reach even a reasonable basis for effecting a settlement. Boland says, and Watson and Judge Archbald deny, that there was on the 23d of August a meeting held in the judge's office, in which the question was spoken of as to having a writing to show that Watson was entitled to a fee of $5,000. It was denied by both Watson and Archbald that there ever was such a meeting, and Mr. Watson says he never saw that paper until it was called to his attention before the Judiciary Committee.

A great point was attempted to be made yesterday that there was a raising of the price from $100,000 to $161,000, although the amount of $100,000 was spoken of at the meeting in Judge Archbald's office, as Mr. Boland claims and the others dispute. I do not care whether that is so or not. It is as immaterial to this case as anything very well can be; but the fact is testified to by Mr. Watson on pages 1116 and 1117 and 1119 and 1120, where he sets forth just exactly how the change from $100,000 to $161,000 came to be brought about. I read from the top of page 1117:

Mr. WATSON. From the first time that the price was fixed at $100,000 the property that was to be passed had changed very materially. There were different things to be done with it, and then when they offered this property first there was no two-thirds interest offered. The Marian Coal Co. in its entirety was offered to me.

Mr. FLOYD. For $100,000?

Mr. WATSON. For $100,000. That would include the suit—well, I may say the suit; yes. There was the Peale matter; Mr. Peale had $16,000, which was admitted. Mr. Peale finally got a judgment stated for thirty-odd thousand dollars, $34,000, or something like that. Now, that was hanging fire over there, and I didn't know that that was a part of this transaction when I first undertook to handle this for $100,000. Now, there was another thing that I didn't know, and that is that one-third of this stock that represented the Marian Coal Co. was in Mr. Peale's hands and belonged to him. That is two things that I didn't know about. The first, the increased indebtedness, the $16,000, I did get an idea of before we got very far along with it. But the larger amount, this $18,000 more added to it, I did not get that, you know, until the decree was—not the decree—until the judgment was entered, which was along after I had gotten out of the matter. Now, I did not know what that litigation was. Then there was another thing that I did not know. I did not know that the Bolands had any dispute of title over there, which they did have finally, and that the Lackawanna claimed a good, sizable interest in this dump. Now, I did not know that. Then, when I brought that to Mr. Boland's attention, and he began to see his $100,000 being carved out by $16,000, by a third interest of the Peales, and by a quarter interest of the Lackawanna, it began to get him down so that he would have trouble getting home on the proceeds; and therefore we agreed or he agreed to raise that to the $161,000, and I was to make that up on the rates. That is what was to happen.

That is the situation, and that is the reason why the price was raised. No one pretends that Judge Archbald had anything whatsoever to do with it. I care not whether he knew that under the original arrangement $100,000 was to be asked and that it was afterwards raised to $161,000, or whether he only knew that $161,000 was to be asked, the result is precisely the same so far as it can in any way affect this case.

It is said, and said truly, that the judge had a later interview with Loomis on or about the 25th of September, and then on the 27th he got a letter from Loomis saying that no settlement could be made because the Bolands were asking too much; that he had an interview with Phillips at his own home on the 30th of September; that he had an interview here in Washington with Watson on or about the 7th of October; that he had a still later interview with Mr. Boland asking him to see Mr. Loomis after Watson had failed and given up the job; that he did see Loomis and found that he could not effect a settlement, and then on the 30th of November returned all the papers to Mr. Watson and told him that the settlement could not be carried through because of the vast difference between them as to the figures which the one was willing to give the other was willing to accept. Mr. Worthington asks me to read in the same connection with that which I have already read a sentence from the testimony of Mr. Watson. I read from page 1119:

I had every reason to believe perhaps it was so, and therefore we added it together and it made $161,000, and that is the only price I ever had, the only price I was ever authorized to offer the land for to the Lackawanna road, and I offered it at that price.

I may say just in this connection that there is a letter of Mr. Phillips to Mr. Loomis, both of them officers of this road, showing exactly how that $161,000 was made up, on the demand of Mr. Boland, in that it was by multiplying 376,000 tons of coal, which had been shipped from their washery over this road, by 43 cents a ton, which they claimed was the excess price charged against them, making just exactly the price which was presented to the Delaware, Lackawanna & Western Railroad Co. by him.

There is no thought or pretense that Judge Archbald had any interview with them in which anything of that kind was said, or that he had anything whatsoever to do with the sending of that letter. There were, even after Judge Archbald returned the papers to Mr. Boland—which, by the way, they never produced, because those papers would have shown the $161,000 most clearly, and it is the only letter that they did not produce themselves, although it was sent to and admittedly received by them, and although Mr. Pryor says he saw the papers which were inclosed lying on their desks, and Mr. Boland himself testified to it—there were later attempts to settle made by the Bolands themselves and Mr. Phillips went upon the stand and testified to it. I read from page 878:

Q. (By Mr. Worthington.) State any reason Mr. Christopher G. Boland gave you on that occasion for wishing to have the claim of the Marian Coal Co. against the railroad company settled.—A. He stated in a very affecting way, with tears rolling and coursing down his cheeks, that he was worried and fretting about his brother Will; that he was afraid he would lose his mind.

But it is said here that there is to be an inference drawn as against Judge Archbald unfavorably because the letters which were sent to the officials of the railroad company were written on Commerce Court paper. Mr. Manager STERLING said yesterday that they were all thus written. That is a mistake; not an intentional mistake, but none the less an actual mistake. Most of them were so written. So also most of the letters which were written to other people appearing in this case were written on Commerce Court paper. But there were a few letters written not on Commerce Court paper as well to the railroad officials as to other people. But the explanation of it, and the perfectly natural explanation of it, was that which was given by Judge Archbald when the question was put to him. He said, "I never thought anything about it. I dictated the letters to my stenographer, and she wrote the letters on that paper because it happened to be handiest, and she brought them to me and I signed them, and the letters were sent out."

I do not know how far custom has made it right for men in official position to write private and personal matters on official paper. I know that I personally have received a great many letters thus written, and on purely private business, and I know that I never heard it challenged until this case commenced, or heard it said that that was proof of any wrongdoing by anybody.

I recall reading in sacred history that some 19 centuries ago the scribes and pharisees brought before Christ a woman who was taken in adultery, and they tempted Him, asking Him what should be done with that woman. The Sacred Book tells us He stooped down and wrote with His finger upon the ground. And when the men who brought her there saw what was written upon the ground they all went away without making any accusation against her. Tradition says that that which was there written upon the ground contained the names of those with whom that woman's accusers had themselves committed adultery.

I wonder whether or not if that same inerrant finger could come here this day and write upon the walls of this Chamber, if, indeed, those walls are vast enough for that purpose, the names of those to whom Judge Archbald's accusers had written on private business upon official stationery, how many of those accusers, like the scribes and pharisees of old, would quietly slide away, not waiting to hear "He that is without sin among you, let him cast the first stone."

But it was said that the pendency of the Peale case had something to do with it. That case was pending in Judge Archbald's court, and they say that he had no business to undertake to act in this matter because of the pendency of that case. But,

gentlemen, it is an admitted fact, entirely outside of the facts to which I have already called your attention, that there was nothing done in that case which was in any way improper. I read from page 933, where objection was made to an offer of proof by Mr. Fitzgerald, who was one of the counsel in the case, because there was no claim of improper conduct. The Presiding Officer ruled that:

The Chair remembers there is no issue raised in the articles of impeachment as to the improper conduct of Judge Archbald in this particular case.

And, again:

If the facts indicated by the question were established by the evidence, it would not affect the case in any manner, because there is no charge in the articles of impeachment of any improper conduct of Judge Archbald in that particular case, as the Chair recollects.

And that admission on behalf of the managers answers so completely the wild statements which were made by William P. Boland when upon the witness stand, namely, that the judge did influence Judge Witmer to make a wrongful decision, and that the judge decided the demurrer in the case because of their refusal to discount the note, although the note was not drawn for months after the decision was rendered—that admission on behalf of the managers takes that matter so far out of this case that it is not worthy of further consideration.

I think, so far as article 2 is concerned, we are now in a position to summarize it without going far astray as to the result. We have here admittedly a judge of integrity—of integrity as a judge and as a man—impartial in all he did, who never undertook to sit in any case, even as to these litigants, after he had undertaken to settle their controversy; who is able, industrious, and impartial; and you are asked to say that that man is corrupt and dishonest and ought to be removed simply because he undertakes at the behest of one friend to settle the difficulty which another friend is in. I want to know what the Members of this Senate would do if they were in the position in which Judge Archbald was, as stated by him. I read from page 1195:

I had known Mr. Boland 30 or 40 years; I can not tell just how long. I knew him familiarly enough to speak of him by his name. People call him "Christy." I talked with him in a friendly and familiar way every time we met. He came to me in my office on one occasion—I can not fix the exact date; I have no means of doing it—and told me about this settlement. He said that the matter was preying on the mind of his brother, W. P. Boland, and he expected if it went on further that it would end in his brother going to an asylum. My impression is that tears came to his eyes, and he drew upon my sympathy in that way by what he said and in his appearance. He asked and spoke about this settlement, and wanted me to see what I could do with regard to it. He came two or three other times in a similar way at a later date. I can not fix the time when that occurred.

I want to know, gentlemen, if a friend of yours of 30 or 40 years' standing had come to you and said that thing to you what would you have done? Mind you, C. G. Boland was called upon the stand as a witness after that testimony was given and never undertook to dispute it in the slightest degree. What would you have done? I believe as long as red blood flows in your veins you would have done just what Judge Archbald did. You would have gone out at the behest of a friend of that kind and you would have striven to settle the difficulty which so seriously threatened the mind and memory of that friend's brother. And there could be drawn as against you for doing that thing nothing whatsoever; but in your favor, many, many things.

If Judge Archbald had endeavored to sit in that case after that time, there might have been some slight shadow of a complaint; but there is no pretense of that thing. He exercised his manhood rights; he played the part of a Christian as he was required to play it, and instead of being condemned he should be praised.

I recall that in the Sermon on the Mount we are told that "blessed are the peacemakers, for they shall be called the children of God." But if a man were in Federal office and should be deprived of the right to do that thing, then must it be said that "cursed are the peacemakers who are in the Federal service, for they shall be impeached for treason, bribery, or other high crimes and misdemeanors"; and nothing less than that can be said in regard to it.

I pass, gentlemen, to the fourth article. That article has attracted more attention in the Senate, if one may judge by the number of question that were submitted to Judge Archbald when upon the witness stand, than any of the other articles.

I shall not undertake to claim here that that which Judge Archbald did on that occasion could not better have been done otherwise. I think it could. But that is not the question. The question here is whether that which he did constitutes a high crime and misdemeanor. And there is no other question than that in it. And unless you find that it does constitute a high crime and misdemeanor, however much you may regret and reprobate that which was in fact done, you must find a verdict of not guilty upon this article.

Let us see what the case is. The New Orleans Board of Trade had suggested and finally instigated proceedings before the Interstate Commerce Commission growing out of freight rates on the Louisville & Nashville road, from New Orleans to Montgomery, by one route through Pensacola and by another route through Mobile. The Interstate Commerce Commission had early adopted for their guidance the rule that if the through rate for freight between two points was greater than the sum total of the local rates between the points that that, if not conclusive, certainly was a most violent presumption to establish the fact that the through rate was an improper rate and ought to be reduced.

When that rule was promulgated the Louisville & Nashville, which was up against water competition as to a part of its route, in order to comply with the requirements of the commission, changed the rates so that the through rate did coincide with the sum total of the local rates. That settled the proceedings for a little while, but later on they were instituted and carried on in the Interstate Commerce Commission, and there were two questions raised in those proceedings; the first related to what are known as class rates and the second to that which are known as commodity rates.

"Class rates," as Judge Archbald explained the other day, means rates upon a number of, comparatively speaking, similar articles. "Commodity rates" means rates upon an individual article, because it is supposed to be more expensive to transport than other articles.

And when the Interstate Commerce Commission came to pass upon the matter they decided only one branch of it. As the papers which related to that were not read when they were introduced in evidence, I think it important, that there may be a proper comprehension of exactly what the situation is, that you may know just what the Interstate Commerce Commission did decide, and I will read now from the concluding clause of their opinion in this case:

In regard to the commodity rates attacked in these proceedings, certain adjustments and changes have been made therein by the defendant since the institution thereof with the view of correcting inequalities or excessive charges found to exist, which adjustments and changes are admitted to have removed the cause of complaint to some extent. It is impracticable in the present state of the record to determine satisfactorily what other changes, if any, respecting commodity rates should be made. These cases will be retained therefore for such further investigation and consideration of commodity rates involved as the facts and circumstances may seem to require.

So that, you see, in the case pending before the Interstate Commerce Commission they decided the question of class rates and they reserved the decision as to commodity rates, and in that aspect of the matter the Louisville & Nashville Railroad filed their petition in the circuit court of the United States, which proceedings were subsequently certified to the Commerce Court at the time of its creation and became the first case in that court.

Of course that petition could only attack the ruling of the Interstate Commerce Commission in relation to class rates, because there was still pending and undecided the question of commodity rates. That is all it did attack. While it was in that shape Judge Archbald told you—and about that there is no dispute—that the Commerce Court, in considering the matter, reached the conclusion that they would sustain the ruling of the Interstate Commerce Commission.

Judge Archbald did not agree with that conclusion and undertook to write a dissenting opinion. In the course of that undertaking he found the particular clause in the testimony which had been quoted—and I am not going to stop to read it, for it is not worth while—by which, judging that by the context, it would appear as if the word "not" had been omitted. And it was in that aspect of the matter he wrote to Mr. Bruce to obtain the fact upon the point, so that he might use it in connection with his dissenting opinion.

It may be said that the elimination of the word "not" was a very important elimination, and in a sense it would be so; and yet, curiously enough, in this record before the Senate we have no less than four instances where the word "not" has been omitted in the printed proceedings, which had to be corrected by calling the attention of the Senate to it, after the reading of the Journal. And it finally appears omitted in the brief which Mr. Manager CLAYTON has filed and that has not been corrected, and the "not" is still omitted up to this day. So it plays very little part whether the word "not" was omitted or whether any other word was omitted.

So if you choose you may say that it was a blunder or mistake, or any word you choose to attach to it, on the part of Judge Archbald not to call attention of counsel on the other side, and also call the attention of the other judges of the court to the receipt of that letter from Mr. Bruce. Call it that if you choose.

Mr. Manager CLAYTON. Will you please give me the page of the brief in which the error to which you have referred occurs?

Mr. SIMPSON. Page 7. I will call attention to the exact point later on if you wish.

The question is not whether that was a mistake on his part, but whether there was an evil motive in that mistake. There can not have been an evil motive in that mistake, because it is an admitted fact in this case, which probably the Senators have forgotten, but which was admitted when Mr. Bruce was on the witness stand, that that letter which was received by Judge Archbald was pasted by him into the record in that case and remains in that record unto this day, and is printed in the paper book in the Supreme Court, where that case is now pending.

Now, can anyone under God's heaven imagine that there could be an evil motive in a man writing and receiving a letter when that man would paste that letter into the record where everybody could see it?

I do not know whether or not that is how the managers found out in regard to it, but that is the fact, and it negatives in the most conclusive way the possibility of any evil motive in regard to it.

The same thing is true, only in a somewhat different sense, of the second letter that Judge Archbald wrote. That letter was calling attention to that which Judge Mack had discovered, or thought he had discovered, of what are known as variations from the Cooley award. But those variations related purely and simply to the commodity rates which had never been decided by the Interstate Commerce Commision, and therefore were not before the Commerce Court.

And so it was that when Mr. Bruce replied to Judge Archbald in regard to the matter, he called attention to that identical fact, and I shall read only a few lines from the letter to demonstrate that:

> Finding that the commission had decided nothing on the subject of commodity rates, but had expressly reserved that subject for further consideration, and that the equity suit filed by the railroad company attacking the commission's order was therefore necessarily confined to the subject of class rates, to which the commission's order was confined, I never attempted to make any investigation of the subject of commodity rates or to make any preparation of the case based upon the consideration of them; and I do not see how any question pertaining to commodity rates can now be before the Commerce Court.

Of course, no such question was before that court, and it was quite unnecessary, however wise it might have been to call the attention of the court to that fact by producing the letter, especially as according to the statement of Judge Archbald the thing became wholly immaterial in the consideration of the case.

But if that thing was something which he should not have done, it was at most a breach of the law of ethics. It was no breach of any known law of the land. It was no more a breach of ethics on the part of Judge Archbald than it was a breach of ethics on the part of Mr. Bruce himself, for he testified, when he was before you, that he did not communicate the facts to counsel on the other side, and he testified also—and it is in this record—that he got a letter from Judge Mack, who was writing the dissenting opinion, and he replied to that also.

I do not know how many Senators there are in this Chamber who know Mr. Bruce. Probably both of the Senators from Kentucky do know him. If they do know him, I am quite sure they will say to you, as one of the Justices of the Supreme Court of this country said not very long ago, that he is one of the very best lawyers, one of the highest-toned lawyers, that ever came to practice at their bar. If a man of that character should commit a breach of the law of ethics, why complain of Judge Archbald and claim that it is a crime that he did likewise?

I want, in that same connection, and closing all that I have to say upon that point, to read to you what was said by Mr. Manager STERLING yesterday. I read from page 1361:

> Do you ask the question, Would you impeach and convict Judge Archbald and remove him from office for his correspondence with Helm Bruce? I speak for myself when I say no; I would not if that stood alone, but it is a part of the system; it is one fact which dovetails into this line of conduct which he has carried on with the railroads, and it is a system so rank that "it smells to heaven."

He may say that as much as he pleases. The point in it, however, is this: That when you come to vote on the fourth article of impeachment you are only to determine under that article as it is expressed whether or not the sending of those letters to and the receiving of the letters from Mr. Bruce, without notice to counsel on the other side, is an impeachable offense.

You can not carry into your decision as to the fourth article anything which relates to any system, if such there be. To do so would contravene the very first fundamental principle of a trial, namely, that a man shall be convicted only of that which is charged against him. And so little did the managers of the House think of it as an element in itself that they did not even include it in their dragnet thirteenth article at all. It is not even suggested there, and hence to claim that it is part of a "system" is simply a claim not to be considered at all.

I pass on to the fifth article. I am afraid my colleague is or should be getting nervous for fear I will use a part of his time.

Mr. WORTHINGTON. Take all the time you want.

Mr. SIMPSON. The fifth article Mr. Manager FLOYD said yesterday he considered was one of the most important of them all. I think it was Mr. FLOYD who made the statement; but if not, it was one of the others, but I think it was Mr. FLOYD. And yet that article is one of the simplest of them all.

The charge in that article is that Mr. Frederick Warnke in 1904 was the owner of a two-thirds interest in certain coal lands owned by the Philadelphia & Reading Railroad Co., and the railroad company forfeited the lease which Mr. Warnke had, and that he afterwards went to Judge Archbald and asked him, Judge Archbald, to intercede with the officials of the Reading Railroad Co., and in consideration of that intercession Judge Archbald received the sum of $510.

Now, that is the substance of that charge. I do not care about taking the time to read it at length.

You will perceive at once, therefore, that all the evidence which was introduced here by the managers which related to the arrangements existing between John Henry Jones and Fred W. Jones, and whatever agreements there may have been between them are wholly immaterial to the consideration of this article. You will perceive also that under that article, unless that $510 note was given as a consideration for Judge Archbald using his influence with the Philadelphia & Reading Coal & Iron Co., it does not make any difference for what it was given. It is not charged to be anyways wrong, if, as the fact was, it was a commission for the sale to the Premier Coal Co. by the Lacoe & Shiffer Coal Co. of the fill known as the old gravity fill, for in that event it is not a subject of complaint in this article.

Let us see what the facts are. It is undoubtedly true that there was an interest which Mr. Warnke had in a lease with the Philadelphia & Reading Coal & Iron Co. It is not questioned here but that he had expended $65,000 to $75,000 in rebuilding the washery and getting ready to wash the coal that was in the dump. It is not questioned here but that the original lease, of which he was the assignee, had a clause in it that if there was an assignment of the lease the Philadelphia & Reading Coal & Iron Co. had the right to forfeit the lease; and there is no doubt but that—cruelly, as I think, though within their legal right—they did forfeit the lease because of that assignment, and that Mr. Warnke lost his $65,000 to $75,000. There is no doubt, also, but that he undertook, through himself and through other friends of his, to induce Mr. Richards, of the Philadelphia & Reading Coal & Iron Co., to reconsider that determination and to try to get back the lease which he had had or to lease to him the Lincoln coal dump, so that he might in some degree recoup a portion of his losses.

There is no doubt but that he came to Judge Archbald, that he told Judge Archbald the story of his losses, and that he asked the judge if he would not go to Mr. Richards and see if he, the judge, could not get for him, Warnke, an interview with Richards, to the end that he might endeavor again to persuade Mr. Richards to yield the point and give him back the washery or give him the Lincoln dump, so that he might recoup his money.

There is no doubt about the fact that Judge Archbald, then being about a visit to Pottsville, wrote a letter, in which letter he said he was coming to Pottsville on a certain day, and he asked Mr. Richards if he could not see him; that he saw Mr. Richards and then put the proposition before Mr. Richards; and that he then for the first time learned that Mr. Richards had been previously importuned to grant that relief to Mr. Warnke, and that then for the first time he also learned that like the laws of the Medes and Persians the rules of the Philadelphia & Reading Coal & Iron Co. can not be altered, and they would not consider anything Mr. Warnke might have to say.

All those things are without any dispute. But is there any crime in that? Is there any wrongdoing in that? It is not even alleged that the Philadelphia & Reading Railroad, or Railway, or Coal & Iron Co. had any litigation pending before any court of which Judge Archbald was a member. That was admitted in the argument made here yesterday.

What they say—and it is one of the most curious arguments I ever listened to—that because in the sale of the gravity fill he did take a commission and wanted to know "why not"; that you might infer from that fact alone that the note which was given to him on this occasion was given to him as a consideration for trying to help Mr. Warnke. This to me is one of the most curious arguments that anyone could bring before any

body of men supposed to be sitting as judges, especially as months of time even had intervened before the note was given.

But there is no evidence whatsoever that that note was given at all for any such purpose. There have been before you no less than five witnesses, every one of whom testified that that note was given as a commission on the sale of the old gravity fill. There is no doubt, because there has been here produced before you the letters by Mr. Berry and others, that Judge Archbald had an option upon the old gravity fill. There is no doubt that he undertook to sell that to the Central Brewing Co., and that they sent and examined it and for reasons satisfactory to themselves said that they would not take it. There is no doubt that the examination which was made for that brewing company was made by Mr. Warnke, and that he became satisfied from the examination which he then made that there was sufficient value in that fill for him to buy it; and that he then entered upon negotiations with Judge Archbald, while he still held that option, for the purchase of that fill.

It is true that while those negotiations went on the original option ran out. There was still, however, the oral option. But whether there was a written or oral option makes absolutely no difference. Under the law of Pennsylvania, whatever may be the law elsewhere, if an agent or commission man brings the parties together and that results finally in a contract, it makes no difference whether that man has anything to do with the final making of the contract, whether his agency ceases in the meantime or no, or what could happen to it, having once brought the parties together resulting in a contract, he has done all that the law requires of him, and he is entitled to be paid his commission.

That is the reason why the commission was paid to Judge Archbald in this case, and that is the reason why he was entitled to retain so much of it as he did in fact retain. Of course, he gave half of it to Mr. Jones, who was interested in the matter with him, and he produced his checks and check stubs showing that identical fact, and it is a conceded fact throughout the case.

Now, I want to know what you are going to do under circumstances such as these with the presumption of innocence to which I heretofore have adverted, and to the doctrine of reasonable doubt, and to the effect to be given to good character, when upon such an argument as was made yesterday by the managers in regard to it you are asked to charge Judge Archbald with crime, as against the testimony of at least six witnesses, without one single word from anybody in antagonism to that which those witnesses have said.

I pass to the seventh article. The allegation in that article in regard to Judge Archbald is that while he was sitting as a judge in the district court—that brings up a new question of law which I am going to refer to in a moment—he entered into negotiations with one W. W. Rissinger in relation to a coal-mining scheme, I think it was in Venezuela, and that while those negotiations were going on he tried the case of the Old Plymouth Coal Co., in which Rissinger was a stockholder, against various insurance companies, and that while also that matter was pending he indorsed a note for $2,500 at the request of Mr. Rissinger and caused it to be presented to Mr. Lenahan, who was one of the counsel for Mr. Rissinger in the trial of that particular suit.

The first question which arises is the one which has been referred to by several of the managers, and was suggested, I think, by the Senator from Idaho [Mr. BORAH] in the beginning of this trial, viz, whether or not the Senate can now consider an article of impeachment which relates to acts done while Judge Archbald was a district judge before his appointment to and confirmation as a judge of the Commerce Court. I shall not take much time to argue that legal question for the reason that all of the articles, beginning at the seventh and running to the twelfth, which deal with this question are articles of comparative unimportance. But inasmuch as the question has been raised, it ought to be considered, and so, briefly, I shall consider it. The managers in their brief say, this in referring to this question:

> In this respect the case here presented seems to be unique in the annals of impeachment proceedings under our Constitution.

And they say further in that regard that they can justify the articles of impeachment, notwithstanding the change of office, because the two offices are substantially the same within the contemplation of the constitutional provisions relating to impeachments.

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and I wish to read a paragraph in regard to it, even though it takes a little time to do it. In referring to the clause of the Constitution to which I have adverted Judge Story says:

> From this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, including the President and Vice President. In this respect it differs materially from the law and practice of Great Britain. In that Kingdom all the King's subjects, whether peers or commoners, are impeachable in Parliament, though it is asserted that commoners can not now be impeached for capital offenses, but for misdemeanors only. Such kinds of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust are the most proper and have been the most usual ground for this kind of prosecution in Parliament. There seems a peculiar propriety, in a republican government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal and ought to have the same security of a trial by jury for all crimes and offenses laid to their charge when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value as a protection against the resentment and violence of rulers and factions in criminal prosecutions makes it inestimable. It is there, and there only, that a citizen, in the sympathy, impartiality, the intelligence, and incorruptible integrity of his fellows impaneled to try the accusation, may indulge a well-founded confidence and sustain and cheer him. If he choose to accept office, he would voluntarily incur all the additional responsibility growing out of it. If impeached for his conduct while in office, he could not justly complain, since he was placed in that predicament by his own choice, and in accepting office he submitted to all the consequences. Indeed, the moment it was decided that the judgment upon impeachment should be limited to removal and disqualification from office it followed, as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the National Government to confine it to these limits, for in the original resolutions proposed to the convention and in all the subsequent proceedings the power was expressly limited to national officers.

If the argument which was thus presented by Judge Story is sound, it must necessarily follow that the similarity of the two offices is not and can not be of any moment whatsoever. Can it be said that if a civil officer, say, in the Cabinet of the President, is transferred from one portfolio to the other and continues steadily in office that he may be impeached while holding the second office for that which was done in the first; and yet if he passes from the Cabinet to the Senate or into private life he can not be impeached at all? There is no logic or sound reasoning in any such proposition as that, nor is it in accord with any well-settled principles. In the provision which the managers quote in their brief from Mr. Foster he says this in regard to that:

> It includes such action by an officer when acting as a member ex officio of a board of commissioners, and such action in the same or a similar office at an immediately preceding term.

Now, I want to know why limit it to the immediately preceding term if the similarity of the office is the test in determining whether the impeachment will lie or not. Of course, that can not be sound; and the only reason why Foster wrote in his commentaries the "immediately preceding term" was because he felt that the line must be drawn somewhere. He knew that in certain of the State courts, under the language of their constitutions, it had been held that in a succeeding term of the same office there might be an impeachment for that which occurred in the immediately preceding term. But it remained for the managers to evolve the doctrine that it was to be a substantially similar office which was the test in determining the matter.

I submit that the proper test is the one to which I have already adverted. It is that the office, during the incumbency of which the acts were done of which complaint was made, shall be the determinative factor in deciding whether or not impeachment shall lie for the offense charged. If that is not so, there is no logical conclusion from the position which one of the managers assumed (I think it was Mr. Manager Sterling, though I may be mistaken about that), that so long as the man is in public office, whether the office is substantially similar or no, or whether there is a continuity of term or no—so long as he is in public office he may be impeached for anything which he has ever done in the past because, as it was claimed, the purpose of the constitutional provision is to put out of office all those who by their past lives have shown that they are unfit to occupy it. That position would be a logical one, but there can not be a case found to sustain it; and all the authorities decide precisely the reverse. But, as I said, that is a comparatively unimportant matter, and I pass from it to consider what the real charge is.

That real charge is that Judge Archbald was corrupt in sitting at the trial of that case while negotiations were pending as to a matter in which he was interested, and in causing the

note, while the matter was pending, to be presented for discount to counsel for one of the parties to the litigation. It is impossible to conceive that that can be so. There can not be a corrupt conspiracy unless there were at least two people to it. If there was a conspiracy between Judge Archbald and Mr. Rissinger, will somebody tell me why when those suits were brought they were not brought in Judge Archbald's court? Yet the record which is here produced shows they were not. They were brought in the common pleas court of Lackawanna County, Pa., over which Judge Archbald did not preside.

Can anyone understand why the other party to the suits, the one who was to be injured, should remove the case into the Federal court over which Judge Archbald was to preside if the conspiracy was between Judge Archbald and Rissinger?

Can anyone understand why, if there was a conspiracy between Judge Archbald and Rissinger in regard to the matter, the rulings, so far as they took place, with one exception, to which I will advert in a moment, were all in favor of the other party to the litigation? Yet Mr. Shattuck, when he was upon the witness stand, and he was counsel for the insurance company which was supposed in some way to have been injured, testified that every decision in the case, barring the one, was made in accordance with his suggestions to the court and as against Mr. Lenahan's and Mr. Rissinger's claim.

The one to which I now wish to advert is this: When all the evidence for the plaintiff was in the counsel for the defendant, Mr. Shattuck, moved for a nonsuit, not a demurrer to the evidence, for that is not known to the practice in Pennsylvania, though the legal effect is precisely the same. He moved for a nonsuit, and the court refused to grant the nonsuit. They said it was a case for a jury, and, as Mr. Shattuck said, it was a case for the jury upon a single question, which single question was whether the building which had been burned down belonged to the old Plymouth Coal Co., which was operating the washery, or belonged to the railroad company, which owned the dump, the building having from time to time been altered and added to by the old Plymouth Coal Co. during the course of their washery proceedings.

When they had gone on a little way in the evidence counsel got together and agreed upon a settlement of the case, which was carried into effect. There is no claim here, and it is distinctly denied in the evidence, that Judge Archbald had anything whatsoever to do with bringing the counsel together. It is not claimed here; on the contrary, it is admitted by the managers by an express admission, and it is also testified to by Mr. Lenahan, representing the coal company, and by Mr. Shattuck, representing the insurance company, that the decision which Judge Archbald made upon that point was right; and Mr. Lenahan told you that Mr. Shattuck turned to him after the decision of the case and said to him in substance, "The jig is up," and that he had had no defense whatsoever, and Mr. Lenahan further said to you that there really was no defense of any kind to the case.

Now, I ask whether or not on that state of facts you can find anything wrong as against Judge Archbald? As I said, Mr. Manager STERLING admitted during the trial that every ruling was proper—every one, without an exception.

Oh, but they say Judge Archbald permitted that note to be presented to Mr. Lenahan for discount. Judge Archbald says that he did not. Mr. Lenahan does not say that he did. Mr. Rissinger says that he did not. Indeed, there is a slight dispute between Rissinger and Lenahan as to whether the note was ever presented to Mr. Lenahan. Certainly if it was presented at all it was presented in the most indefinite sort of a way. Lenahan admits he never saw it. Rissinger says that what occurred was that he went to Lenahan, not even having the note with him, and asked him whether he would have his bank discount that note, and Lenahan says, "I said to him 'What do you want it for?' He told me he wanted it for raising money in relation to this mining scheme down in Honduras," or in Venezuela, wherever it was, and that then he, Lenahan, said to him, "Why, I will not go to my bank and discount a note for any such purpose as that. They would laugh me away if I did anything like that, because they will not discount a note for the purpose of using money in any mining scheme of a wildcat nature whatever."

Knowing of the entire failure of their evidence, there was an endeavor yesterday to drag in Mr. Rissinger's testimony before the Judiciary Committee, though it was never even referred to at the trial in this case, and to assert that his stories, as testified to on the two occasions, were wholly at variance. Even if that were so, though there is no evidence to show it, it is inconceivable how Judge Archbald could be affected by it.

There is just one other thing in that aspect of the matter which ought to be referred to. Before the note was presented to anybody, indeed before it was indorsed by Judge Archbald, there had final judgment been entered in the suit about which this complaint is made, five days before that day, and the record which is produced and offered in evidence here shows that fact to be true. Now, I ask, Is Judge Archbald to be charged with some crime or with some wrongdoing because as an accommodation to a friend he indorsed that friend's note five days or any other time after the only litigation in which that friend had any interest was finally settled in his, Judge Archbald's, court? If he is to be blamed for that, will somebody kindly let me know what the statute of limitations upon that point is? I want to know when a judge having disposed of litigation in which a party is interested can for the first time be permitted to have anything to do with that one who had in the past been a litigant in his court. Is it five days or five years or five centuries? In point of fact, the test is, and necessarily must be, the point when final judgment is entered in the case. At that time the judge's function is at an end; the case is over so far as the judge is concerned; and the question is simply one of collection between the parties to the litigation.

I pass to articles 8 and 9, and I refer to them together because they both grow out of precisely the same transaction. Judge Archbald indorsed a note for $500 for John Henry Jones. The eighth article charges him with a crime because he permitted that note to be presented to C. G. Boland and William P. Boland for discount, there then being pending in his court the case of Peale against the Marian Coal Co., in which company the two Bolands were large stockholders. The ninth article charges him with a crime because he permitted that note, or directed that note, if you choose—I am not caring for the wording in regard to it—to be presented to C. H. Von Storch, who some time in the past had been a litigant in his court. That is the gravamen of those two complaints.

It is alleged also in those articles that the note was given for the purchase of an interest in an oil concession in Venezuela.

The facts in regard to those articles can very easily be considered together. There is no doubt that Mr. Jones did have an interest in an oil concession in Venezuela; there is no doubt he came with this note to Judge Archbald and asked him to indorse it, and that the judge did indorse it. Up to that point the evidence is clear. There is no doubt also that Mr. Jones took that note and presented it to his bank for discount, and that that bank refused to discount it because a couple of other notes, upon which Mr. Jones was indorser, had been protested for nonpayment on account of the failure of the maker of those notes. There is no doubt also that Mr. Edward J. Williams, who figures in the first article, then suggested to Mr. Jones that the Bolands would discount the note; that he took it to the Bolands and asked them to discount it, and that they refused to discount it, they, say, upon high moral grounds. I am not going to enter into any controversy as to whether their grounds were good, bad, or indifferent. Williams had the note for three days. He then took it to another bank, and they, for some unknown reason, refused to discount it, and he then returned it to Jones. Then it was suggested that Mr. Von Storch's bank might discount it. T. Ellsworth Davies, I think, was the party who suggested that to Mr. Jones, and Mr. Jones and Mr. Davies then went to Mr. Von Storch, and Davies introduced Jones. Von Storch said, "Leave the note here until I look into the matter." He subsequently called up Judge Archbald on the phone and asked him if it was his note. Finding that it was, he directed that it be discounted. It was discounted, and Jones got all the money.

Those are the undisputed facts. If you add to those the disputed facts they still make no crime. The utmost that can be said in regard to it is that the judge, knowing that the note was to be presented to the Bolands, permitted it to be done. Well, suppose he did permit it to be done. Neither of the Bolands nor Williams nor Jones nor anybody claims that he asked them to discount it, or did the slightest thing in regard to it. He says and Jones says that it was presented to the Bolands without Judge Archbald knowing anything whatsoever about it; and Boland himself says that, though Williams told him that Judge Archbald knew that it was going to be presented, he, Boland, did not know whether that was true or not, and they did not have faith enough in Williams to believe it was true. Judge Archbald says that he did not do that thing, and there you have it. How are you going to build a crime out of that? The Bolands admit that they never spoke to the judge in any way whatsoever about it. It came out in the hearing before the Judiciary Committee as a surprise to the judge, except for the fact that the judge says that at some time, the date of which he can not fix, Jones told him that Williams had presented the note to the Bolands and that they

had refused to discount it. That is the whole case upon that point. Is that a crime?

Is what occurred in relation to Von Storch any more of a crime? Mind you, Von Storch had had a case before Judge Archbald which Judge Archbald had partially decided against him and partially in his favor; but that case had been finally settled nearly a year before—11 good months before—the judgment had been paid and satisfied, and that was the end of that case for good. The docket entries show that to be so. Is there, can there, be anything further upon which you can draw any inference or wrong of any kind or character in regard to that transaction?

It is said, however, in this article that the reason they make complaint against Judge Archbald in regard to it is that he permitted this thing to be done in this way, this presentation of this note to persons who were litigants in his court and to persons who had been litigants in his court, because he knew the note could not be discounted in the usual commercial channels, and that, therefore, you are to draw the inference of wrong in regard to it. They offer no evidence at all upon that point. On the contrary, you will remember that when one of the witnesses was upon the stand—Mr. Ruth, I think—he said that Judge Archbald's credit was perfectly good, and that their bank would be willing to discount his note. You have the facts before you, that whenever a note was presented or wherever it was presented, every note that he did indorse was, in fact, discounted by some bank; and you have his testimony in regard to it and the testimony of two or three other witnesses, Mr. Searle, notably, that his credit was good throughout Scranton at any bank. There was no suggestion, as my colleague suggests, that any note of Judge Archbald's, or any note upon which he was maker or indorser, had ever at any time or under any circumstances been dishonored. I want to ask you, therefore, how you can draw from these facts, which are wholly undisputed, any conclusion that his note would not be discounted in the usual commercial channels? Yet that is the necessary basis of the claim which is being made in these two articles.

I now pass to an article which I confess causes my gorge to rise more than any other article of them all. It is charged in the tenth article that in 1910, while Judge Archbald was a judge of the district court for the middle district of Pennsylvania, he accepted an invitation of Henry W. Cannon to take a trip to Europe at the expense of Mr. Cannon; that at that time Mr. Cannon was a director of or interested in a number of corporations, which are named in the article, which corporations were likely to have litigation in Judge Archbald's court; that Judge Archbald knew that fact, and that, therefore, it was a misdemeanor on his part to accept that favor from Mr. Cannon.

Now, what are the facts touching that article? They are wholly undisputed, and they were admitted yesterday, I think, in the argument of Mr. Manager STERLING, to be wholly undisputed. The fact is that Mr. Cannon is a first cousin to Mrs. Archbald; that they were reared together; that the closest friendship had existed between them from the time of their childhood down to the present time; that Mr. Cannon some 10 or 12 years ago had begun to withdraw from active business; that he had purchased a winter place in Italy, where he was in the habit of going from time to time; that he had on repeated occasions before this requested that Mrs. Archbald should go with him and spend a portion of the winter in that home; that they had been unable to make the arrangement; and that now the time had become ripe. So Mr. Cannon wrote a letter, which has been offered in evidence in this case, in which he suggests that Mrs. Archbald shall go with him and spend a portion of the winter in that home in Florence, with her daughter or her son, or, as he says in the letter, if the judge can go, better still with the judge. They accepted that invitation; they went to Florence; they spent several months on that trip; and it was all at the expense of Mr. Cannon. The judge says—and no one contradicts it, for the managers were absolutely silent on that point—that the only corporations which Judge Archbald knew that Mr. Cannon was in any way connected with were the Great Northern Railroad and certain corporations on the Pacific coast.

Now, I want to know how, in the first place, the Great Northern Railroad, or any corporations on the Pacific coast, were likely to become litigants in the middle district of Pennsylvania. I want to know, even if they were likely to become litigants in the middle district of Pennsylvania, how that fact could deter Judge Archbald from accepting that invitation at the hands of his wife's relative, when there is neither allegation nor proof that he ever sat in any case in which Mr. Cannon was interested, or that any corporation in which Mr. Cannon was interested had ever had a case in his court or was ever likely to have one in it. Why should the managers, for the purpose of this article, charge that there was likely to be such a case? Of course they were bound to charge that, otherwise the article would fall of its own weight.

I want also to know what difference there is whether a judge of a court accepts an invitation from his wife's relative to spend a portion of the winter in Florence or whether he accepts that invitation to spend a week end in Philadelphia or in Washington or in Scranton or anywhere else. When a man becomes a judge, is he required to at once withdraw from all the social amenities of life with his and his wife's relatives, because, perchance, they may become litigants in his court? Is he compelled to ostracize himself from all his relations because of that possibility? Yet that is the gravamen of this complaint; and unless that is in it there is nothing in it. Judge Archbald had a perfect right to do just exactly what he did; and there is in the Revised Statutes of the United States an exact provision to meet such a case, viz, for the calling in of another judge to try such a case should it ever arise.

I do not believe—if I may follow the bad example set by the managers yesterday of expressing my own belief instead of arguing from the evidence—I do not believe that Judge Archbald would have sat in any case in which Mr. Cannon was interested if it had come into his court, whether he took that trip to Florence or whether he did not; but the wrong, if any there was, would have been in sitting in the case under such circumstances; and there is no pretense that he ever did so or ever had the opportunity to do so.

So, when he had a wife who had been sick as long as Mrs. Archbald had been, and when, as she testified before you, not only her happiness but her comfort would be so greatly enhanced if he could go along, because he knew just what to do when her troubles came—was he to stay away and let her go alone in that condition or be charged with crime because he went? If there is a man in this Senate who thinks there is the slightest element of a crime in that he has indeed a strange idea of the position of men in this world.

I pass to article 11, which is termed the "purse article." It appears that when Judge Archbald was starting on the trip to Europe, to which I have already adverted, Judge Searle, of Wayne County, Pa., handed him a sealed envelope. On the outside of that envelope was written, "Hon. R. W. Archbald. Sailing orders: Not to be opened until two days at sea." Judge Archbald, when it was presented to him, said to Judge Searle, "What does this mean?" The response came: "A good sailor obeys orders." That letter was opened by Judge Archbald after the vessel had sailed, and then for the first time he learned that there was in it a sum of money contributed by a number of lawyers and ex-lawyers living in his district as a gift to him. He could not then return the money. He had to do one of two things, and Mr. Munson very accurately stated the difficulty under which he was placed by that situation, though Mr. Munson himself did not contribute for reasons which were satisfactory to him. I desire to read from Mr. Munson's testimony, because it explains quite accurately the position in which Judge Archbald found himself:

Q. Will you tell us why you declined to pay the money?—A. I had then, and still have, a high repect and admiration for Judge Archbald and I did not care to embarrass him to either accept or refuse it. That was my reason.

Q. You thought that no matter which course was taken he would be embarrassed in either aspect of it?—A. I thought so; that he would be very much embarrassed. I want to say, if I may be allowed to say it, as I said before, that I have tried many cases before Judge Archbald, both when he was a State judge and when he was a Federal judge. He was always absolutely impartial and fair and I have never tried a case before a more honorable, upright judge than he. I have regarded him as my friend. I knew him when he was a lawyer. He was my correspondent in Scranton. I have tried cases before him for 25 years.

And Mr. Sprout, when upon the stand, testified that when Judge Archbald acknowledged to him the contribution which he made, the letter which was written showed that the judge was very much embarrassed by the situation in which he was placed. What could he do? If he had returned that money, he stood in the position, practically, of slapping every one of those men in the face; he stood in the position, practically, of saying to them, "You have wrongfully endeavored to give me a sum of money; the wrong is yours, and therefore I return this money to you." Would any man want to do that? Most certainly not.

The wrong which was in fact done was, as has been expressed by at least six of the witnesses who testified in regard to this matter, the wrong of Mr. Edward R. W. Searle, who, in violation of that which was arranged, put in the letter which was sent to Judge Archbald inclosing that money a list of the names of the contributors. If that had not been done, if it had been simply a gift of money, certainly nobody could have been heard here to complain. But even then it is a difference

in degree and not in kind whether, when a judge is about to sail abroad, there is sent to him a gift of money, such as there was in this case, or a gift of flowers or of books or of anything else.

I ask whether or not it would be suggested or thought that there was any wrong in the sending or the reception of such gifts as those when a judge travels abroad? I do not suppose you would have ever heard of it under such circumstances, but because the gift happened to be money, instead of other things of value, the charge is made that it is a criminal offense. If it were followed by evidence suggesting in the slightest degree that Judge Archbald had shown any favors to anybody by virtue of that gift, or if it were suggested here, even in the slightest degree, that there was a thought in his mind when he accepted it that he was in duty bound to show or that he would show favors to anybody by reason of that gift, then there might be some slight basis for that which is here charged against him; but there is neither allegation nor proof of that; and in the absence of allegation and proof, you certainly can not say that an upright judge, admitted by the managers to be such, is to be charged with crime upon suspicion under circumstances such as I have thus stated to you.

I pass, Senators, from that to the twelfth article, the last that I shall be called upon to consider. That article charges that Judge Archbald committed a misdemeanor, because he appointed J. Butler Woodward jury commissioner of the middle district of Pennsylvania, Woodward at that time being a railroad lawyer.

I confess, in view of what has occurred in this trial, that I am left in some doubt as to exactly what the managers do mean by that charge. When I offered in evidence the list of jury commissioners in all of the judicial districts of this country, Mr. Manager CLAYTON arose and objected to that list, because, as he said, the complaint against Judge Archbald was not that he appointed a lawyer as jury commissioner, but that he appointed a railroad lawyer. But when the case was being argued yesterday Mr. Manager STERLING said that the complaint was not that Judge Archbald appointed a railroad lawyer as jury commissioner, though that is what is charged in the article itself, but that he appointed somebody as jury commissioner who was especially engaged in trying one particular class of cases before the court of which he was jury commissioner. You, of course, can not reconcile those statements, but the irreconcilability becomes a matter of considerable indifference when it is found, as the fact is, that Judge Archbald did not even know at the time of the appointment that Mr. Woodward was a railroad lawyer, and when it appears, not only from Mr. Woodward's testimony at this bar, but from the certificate of the clerk of the middle district of Pennsylvania, that during the 10 years while Judge Archbald sat upon the bench of the district court there were but three cases of that railroad and its allied coal companies in that court; that in two of those cases Mr. Woodward was not counsel at all; and in the one in which he was counsel it was not tried at all, but, being a technical case, was submitted to a referee by agreement of the parties. It so happens also that in all of the districts of Pennsylvania—the eastern, the middle, and the western districts—the jury commissioners are lawyers.

It is stated in some of the letters which were produced here and finally offered in evidence that it is not shown that they were railroad lawyers. Of course it is not shown that they were railroad lawyers, but neither is it shown that they were not railroad lawyers. The utmost to which the letters go was the statement made that they were not regularly employed by railroad companies.

Now, I want to know what Judge Archbald's duty was when he came to appoint the jury commissioner. We have an act of Congress that stipulates that duty. That act of Congress provides that he shall be "a citizen of good standing, residing in the district," and "a well-known member of the principal political party opposing that of the clerk of the court."

Was Mr. Woodward that? Everybody admits that he was. Was he of a different political party from the clerk? No one questions that. He was a Democrat, as his father and his grandfather had been before him, and, if I may again follow the bad example of the managers in expressing my own knowledge and belief, his is one of the best-known Democratic families that Pennsylvania ever had or ever will have. He is a man of as high character as ever sat in any tribunal, I care not where the tribunal is. I ask the Senate whether or not Judge Archbald is to be complained of because Congress has not put into the law another requirement in relation to jury commissioners, and whether he is to be complained of because he strictly follows everything that Congress requires, especially in the light of the fact that there is no complaint whatsoever of any wrongdoing at any time by Mr. Woodward? On the contrary, we find Mr. Manager STERLING, in his argument before you yesterday, saying this:

> Aye, gentlemen, do you ask the question, Would you remove Judge Archbald for appointing Woodward jury commissioner when it is not proven here that Woodward ever exercised his power wrongfully? Do you say now, honor bright, would you remove him from office for that? No; I would not if it stood alone, but it is a part of the system; it goes to make up the system; it is an incident in the line of misconduct which has been carried on by Judge Archbald.

Yet in the article which we are now considering there is no suggestion of a system of wrongdoing; and in the thirteenth article, which was the dragnet to draw everything else in, there is no suggestion of a system, so far as the jury commissioner or anything appertaining to that office is concerned. Unless Senators are going to violate their oath of office, they can not possibly under this article convict Judge Archbald, because there has been disproven everything which is alleged in the article, and admittedly none of those allegations are true.

It was said by Mr. Manager STERLING in his argument that the portion of the Constitution relating to impeachment was on trial in this case. I do not know, I never can know, how that can possibly make any difference to men sitting as judges. If you are to decide this case according to the known law of the land, what odds does it make whether that portion of the Constitution relating to impeachment is on trial or not? I think with him that it is on trial; but that which is on trial is the determination of the question whether Senators, who ordinarily sit in a legislative or an executive capacity, can rise to the office of judge and judicially decide the questions which are before them, or whether they are to be moved by appeals to passion and prejudice; whether there is to be invoked here a claim that Judge Archbald has done something not in violation of the law of the land, but in violation of a system of ethics which has not yet found its way into the law of the land; whether a court is to decide a case, not upon the law, which is its only guide, but upon other things which have no place in the law at all.

In that aspect of the matter the portion of the Constitution relating to impeachments is on trial; and if this court is going to say that a man shall be turned out of office, although he has violated no law; although, admittedly, every decision that he rendered has been rendered uprightly; although he has never been partial; although he has been able and industrious and just, then you are turning back the hands of the dial of time until you reach the place where, three or more centuries ago, the House of Lords, at the behest of the House of Commons, turned men out of office simply because they did not agree with them politically.

That is the sense in which the article relating to impeachments is on trial.

I want to know what could Judge Archbald do if these articles are to be sustained? The ninth article charges him with a crime because he had business dealings with a man who had at some time in the past been a litigant in his court. The second article charges him with a crime because he permitted a note to be presented to a man who was a stockholder in a corporation which was then a litigant in his court. The tenth article charges him with a crime because he accepts a favor from a man who at some time in the future may be a litigant in his court. The past, the present, and the future are all closed to him under those three articles. What is the man to do? Can he not buy a suit of clothes because at some time the man who keeps the clothing store may be a litigant in his court? Can he not order his dinner in a restaurant of a proprietor who at one time in the past had been a litigant in his court? That is the tendency and the necessary result of those articles.

I suggest to you that there never has been a time when a man was ever convicted in any court of impeachment anywhere under such circumstances as those. I had always supposed—I know it is true in my great State—that when we find a judge who has been impartial, whose integrity stands admitted, not even challenged, who is able, who is industrious, who has been all of a man—when we find such a man occupying a judicial position we want more of him. For such a man we have encomiums, not blame. However great the mistakes he has made, to his virtues we can be very kind, and to his faults we can certainly be a little blind.

It is highly probable that the case you are now called upon to decide would never have been before you but for the unrest of the times. I mean the political unrest of the times. I am not complaining of that unrest. Make no mistake about that. I am a part of it. I believe the unrest of the times ever leads to higher things. But the unrest of the times does not necessitate the carrying back of this court to the days of the Roman

arena, when, because the populace cried out for a victim, the thumbs were turned down. The unrest of the times does not carry back this court to the time of the Savior, when, though Pilate found no fault in Him, because the populace cried "Crucify Him!" "Crucify Him!" He was sent to His death.

That is not what the unrest of the times does. The unrest of the times lops off a wrong here and a wrong there and a wrong yonder, and leads the people up to the point where when they look back, despite all the errors in the intervening steps, they can say, "We have moved up a step higher in these intervening years," or months or days, and ofttimes hours. But it asks no victim at any man's hands, and least of all does it ask a victim from a body of men who are acting as judges. What would be said of any other court than this if, yielding to passion or prejudice or innuendo or anything of that kind, they condemned any man on evidence such as is presented here? And it is in no way to the honor of this court that you are asked to do a thing that none of these managers, I venture to assert, would ask of any other court in this land.

It has been only a very few days since we heard the Christmas chimes ringing "Peace on earth, good will to men." It requires very little imagination in this Chamber at this moment to still hear those chimes ringing. But is there any peace on earth, can there be any peace on earth, to Judge Archbald, can he feel good will to any man if from evidence like that which has been presented here he is to be branded as a criminal and thus sent out into this world? I can not believe that those bells have chimed good will to men in vain. I can not believe that in the highest court which this land knows—in the Senate of the United States sitting as a court for the impeachment of Robert W. Archbald—they will so far forget all the rules of law, all the rules of justice, so far ignore all the well-known laws of the land, as to say that a man who has admittedly violated none of those laws shall be punished because he blundered, I care not how much he blundered.

Over in the State where I come from there are regrets everywhere within its borders that Judge Archbald ever went on the Commerce Court bench. There never has been a day in my time since I have been at the bar that we would not gladly have him in any of our courts, and we would gladly have him to-day. Do you suppose that if he could have at your hands what every other person charged with crime gets in every other court in this land, a trial by an impartial jury of the vicinage, there ever could be a conviction? Do you suppose that in Scranton, where he has been known for fifty-odd years now, you could find 12 men to convict him? If you do, you suppose wrongly. You could not garner them—with all the hate and with all the spite and with all the mistakes that W. P. Boland has shown in this case—out of the middle district of Pennsylvania. No; not five of them. You would have greater trouble than the prophets to save the cities of Sodom and Gomorrah from the hand of the Lord. But because he can not be tried, in the nature of things, before an impartial jury of his vicinage, does that furnish any reason why the character evidence, the necessity for which grows out of that impossibility, should not be given all the weight that would be given to it by the vicinage itself if he could be tried there?

In the early days when a man was put upon trial for crime his neighbors sat as his triers. They knew whether he was likely to commit a crime; they knew whether his accuser was likely to be a truthful man, a biased man, or a lying man, and they judged the case accordingly. Judge Archbald is deprived of that in the nature of things. But he has brought before you character evidence of so great a height that no man could ever hope to attain to a higher one.

There has been upon this stand testifying before you the chief justice of the Supreme Court of Pennsylvania, who has known Judge Archbald for thirty-odd years. There has testified from that stand before you the presiding judge of the superior court, who has known Judge Archbald equally long. There has testified before you the presiding judge of the circuit court of appeals, with whom Judge Archbald sat at times and who at other times passed on Judge Archbald's rulings in the district court. And they all told you that Judge Archbald's character is of the highest. There are three men than whom there are no better living in the whole State of Pennsylvania, and those men come here and tell you that in their judgment Judge Archbald is incapable of crime. Incapable of crime! My God, what better can be said in any tribunal or any court. Incapable of crime! And yet you are asked upon suspicion alone to convict him as a criminal and turn him out of the office which for 28 long years he has graced, and in which no man has said that he has ever done wrong to any one. That is the man you are asked to convict. And you are to convict him under a Constitution which says that except for "treason, bribery, or other high crimes and misdemeanors" he shall not be displaced from his office. When it is done, if it ever is, I will believe it, but there rests not in the power of men sufficient to convince me that this Senate will ever do such a thing, for it seems to me that it would not only be a disgrace to the Senate, but it would be a disgrace to our land, which has ever endeavored to foster and to sustain judges who are of high judicial integrity and impartiality, and who are admitted to be so before those who are asked to condemn them.

ARGUMENT OF MR. WORTHINGTON OF COUNSEL FOR RESPONDENT.

Mr. WORTHINGTON. Mr. President and Senators, the questions of law which are raised in this case and to which I propose in the first place to address myself have assumed an importance greater than we could have anticipated and greater than any which have heretofore arisen in any impeachment trial before this body.

It has been insisted here in the arguments which have been made by the managers on the part of the House of Representatives—not once, not twice, but nearly a dozen times—that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind; but having been brought here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses, he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.

I might humbly suggest that if there is ever to be presented to this great body the question whether or not you have the right to impeach an officer of the United States and remove him from his office because you think that on general principles he is not fit to hold his office there might be presented an article of impeachment which would charge that that was the case and that he and his counsel might be prepared to meet it. But instead of that we have him charged with a certain number of specific acts, and when he comes here to meet those and the evidence is closed and the verdict is about to be reached, then we are told for the first time that you individually—each for himself—are to decide whether upon what you have heard here in evidence you think that on general principles he ought to be ejected from his office.

I have not overstated in the slightest degree the proposition that is presented. I need not dwell upon the importance of it, because, if it be so, then not merely Judge Archbald, not merely all the district and circuit judges of the United States and the Justices of the Supreme Court who sit in this building, but the President of the United States and every civil officer of the Government holds his position by the same tenure.

I may say I think it is a very serious question whether you do not yourselves hold your offices by the same frail right. It never yet has been determined whether or not a Senator of the United States is a civil officer of the Government within the meaning of the impeachment clauses of the Constitution. The question was raised in the Blount case, but as he had ceased to be a Senator at the time of his impeachment, it could not then be decided.

But the same Constitution which speaks of the impeachment of civil officers of the Government says that one of the penalties which you may inflict when you impeach an officer is that he never thereafter shall hold any office of honor, trust, or profit under the Government of the United States. And if you be not officers of the Government of the United States—if the position which you hold be not that of an officer under the Government of the United States—then you can here impeach an officer and remove him from office and provide that he never shall hold any civil office under the Government of the United States, and yet he can be elected to the Senate and sit with you, although he would not legally be fit to hold the office of justice of the peace in the District of Columbia or that of a postmaster at any place in the United States.

So, I think it is a question—certainly it may be a question—whether the Members of the House of Representatives, as well as the Members of this body, hold their office by the privilege of the individuals who happen to compose the Senate at any time and who for any reason may think it a proper thing to remove a person from his office.

That being so, I think it is well to group together the provisions of the Constitution on this subject. I know how wide a range this argument has taken, and how wide a range it has taken when similar questions have arisen, and I may have to follow briefly the lines discussed in previous cases. But to my mind it is utterly unnecessary to go beyond a single clause of

the Constitution of the United States to determine that question, and that is the one which has been so often read in your hearing, which says that civil officers of the United States may be impeached for treason, bribery, or other high crimes and misdemeanors.

If this discussion had originated now for the first time and if this were the first time that that sentence was heard by the members of this body, I should like to know whether there is one of you to whose mind it would ever have occurred for a moment that it meant anything except an offense punishable in a court of justice. I do not like the word "indictability," because a great many crimes are punished by information and not upon indictment. When I use that term I mean it in the sense of punishment in any way in a criminal court.

Now my friend Mr. Manager STERLING when he read certain provisions of the Constitution at the outset of his argument said those were all that were necessary to be considered in this matter. He omitted two of them which to my mind are at least as important as any others and which of themselves should be decisive if the one I have cited does not conclude the question.

Section 2, Article III, paragraph 3, says:

The trial of all crimes, except in cases of impeachment, shall be by jury.

"Trial of all crimes except in cases of impeachment."

Again the fifth amendment to the Constitution says:

Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.

Would anybody suggest that if Judge Archbald should be acquitted by you, the House of Representatives might legally again find articles of impeachment against him for the same offense? Would anybody suppose that if he had not chosen to take the witness stand in his own behalf the managers could have dragged him there and compelled him to testify?

I may mention in passing that this is the first time in the history of the United States when a respondent in an impeachment case ever has taken the stand in his own behalf.

And so the sixth amendment says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Where is the man in this United States of America who would suggest that Judge Archbald could be required to answer without being informed of what is the accusation against him? Where is the man who would suggest that it is not necessary to confront him with the witnesses against him? Where is the man who would say he is not entitled to have subpœnas issued to bring his witnesses here to testify for him? Where is the person who will say that you could turn his counsel out of this Chamber and say he has to defend himself? Why? Because it is a criminal prosecution, and if it be not a criminal prosecution then it is nothing known to the laws of this land.

Now, it so happened that in the formation of this Constitution of ours this happened. I am reading, for convenience, from first Foster on the Constitution, page 508. It is simply a quotation from the proceedings in the Constitutional Convention:

Col. MASON. Why is the provision restrained to treason and bribery only? Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason, as above defined. As bills of attainder, which have saved the British constitution, are forbidden, it is the more necessary to extend the power of impeachments. He moved to add, after "bribery," "or maladministration." Mr. Gerry seconded him.

Mr. MADISON. So vague a term will be equivalent to a tenure during pleasure of the Senate.

So they struck it out and put in, instead of the vague term "maladministration," the term "other high crimes and misdemeanors," and now at the end of 125 years after that was done in that convention the managers of the House of Representatives come here and tell you that the provision as it stands means that Judge Archbald shall be turned out of his high office at the pleasure of the Senate. Nay, it is not at the pleasure of the Senate. It is more than that; it is at the pleasure of the individual Senators. You do not, under their construction of this language, have to decide anything as a Senate, but you may have a vote of the Senate of "guilty" or "not guilty," and if anybody thinks the judge is not sufficiently good looking to be upon the bench he may vote against him for that reason. To use the language of one of the managers—on what ground I know not—if he has a large and expensive family you may vote against him for that reason.

As to these articles of impeachment, there may not be 10 votes in favor of turning him out as to any one, but on the whole Senators may combine their votes and turn him out!

And remember also, Senators, that when this Constitution was created there was the well-known form of removing all civil officers—judges and others—by what was called the address. That was referred to by my brother Simpson. It became the law of England in 1701. By it, without making any charges which would involve disgrace upon the part of an individual officer, if it was thought a good thing to turn him out, the Houses of Parliament could request the King to remove him. That provision was carefully left out of the Constitution of the United States, so that no such power exists.

Now, under the constitutions of the different States it is otherwise. They have seen that an impeachment for high crimes and misdemeanors does not allow an officer to be turned out of his office simply because it is thought on the whole he had better be turned out—that he is not a fit man to be in office. The States have almost universally provided for removal by address.

I happen to have in my hand a copy of an address delivered before a bar association in Oklahoma by a Member of this body, Mr. Senator OWEN, in which he has collated the laws of the different States on that subject; and it shows that nearly all of them have the provision for removal by address.

In an article written by the same distinguished Senator, published in the Yale Law Journal for June, 1912, he expresses the idea which is in my mind and which I have undertaken to state here.

Impeachment—

He says—

is wholly inadequate for practical purposes. It can only be invoked for the most serious crimes.

In another place in the article he says:

Impeachment is too severe a remedy in certain cases and is impracticable for offenses justifying removal but not deserving impeachment, which latter power should only be invoked for actual personal corruption or serious criminal conduct.

Nobody could better have expressed our idea as to what is the meaning of the Constitution than Senator Owen has done in that phrase.

But let me go on with another provision of the Constitution. Article I, section 3, paragraph 7, provides:

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

With what assurance can the learned managers stand before the Senate and say, in view of that provision, that a man may be removed from an office for that for which he could not be prosecuted in a criminal court?

Finally, and most important of all, is this provision:

Section 2 of Article II of the Constitution provides—

The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

A man may commit the most diabolical murder, commit burglary, or rob the United States Treasury of a million dollars or commit any other enormous offense which violates the laws of the United States, and the President of the United States can make his record as white as snow by saying: "I pardon him"; but if you convict Judge Archbald of high crimes and misdemeanors, as you must if you convict him at all, because of these things he has done which it is said are improper, you have put him in a position where he never can escape from the penalty of his action. Nobody can relieve him. He must carry it with him all his life. It will make for him a winding sheet to take with him into his coffin. It will stand here as a record against his children and their descendants as long as this Government of ours shall endure.

The managers say that this is not a criminal matter; that it is merely a little civil proceeding by which to get rid of an officer who you think ought not longer to occupy the position. That applies not to Judge Archbald alone but to every civil officer of the Government. If the President of the United States should happen to do something which you may consider to be an impropriety, there is no means of removing anybody except by impeachment for high crimes and misdemeanors, and you can remove the President of the United States and put him out of office on such futile and uncertain grounds.

I have referred to the language of the Constitution and to what happened when it was formed. Is is said, however, you must be governed by the English view of this subject; that while our fathers had determined that they would get rid of the tyranny of the Parliament and the King when they framed this Constitution of ours, we are to go back and see how they exercised their tyranny and act accordingly in enforcing our Constitution. I say that you are not at liberty to accept the Eng-

lish precedents. It so happens that I have in support of that contention a notable and learned opinion delivered in the Supreme Court of the District of Columbia, sitting in general term about 30 years ago.

You all remember that when President Garfield was murdered by Charles J. Guiteau the wound was inflicted here in the District of Columbia, and the President was taken to the State of New Jersey, where he died. Guiteau was indicted here for the crime of murder, and under the Constitution of the United States Guiteau was entitled to be tried where his crime was committed. The English precedents were that a man can not be tried for murder in any county in England unless his victim had died in that county. Numerous decisions of the English courts to that effect were thrown upon the table and shown to the judge by Guiteau's counsel. Mr. Justice James, a most able judge, one of the ablest who ever sat in this District, delivered that opinion, an extract from which I shall here ask to have incorporated into my remarks, in which he said that we are to determine the meaning of the phrases in our Constitution according to our understanding of the Constitution and that you can not look to alien laws to see what our forefathers meant in framing a government for ourselves. I will not undertake to dwell on that or to read it here, but I shall insert it at this place in my argument.

We turn, now, to the peculiar and higher ground on which we conceive this question should stand, and to considerations to which as a court of the United States, exercising the judicial power of the United States, we are required to give special attention. However proper it may be that the courts of the States where the common law exists should treat the question of jurisdiction from the standpoint of that law, that question must be treated by the courts of the United States, wherever a fort or magazine or an arsenal or a district of country is under the exclusive jurisdiction of the National Government, from the standpoint of Federal authority and with reference to the relation of the crime to the sovereignty of the United States.

We take it to be a fundamental rule of construction that an independent and sovereign government is always to be understood, when it makes laws for its own people, to speak without any reference to the law of another people or Government, unless those laws themselves contain plain proof of a contrary intention, and that, when it thus appears that something is actually borrowed and embodied therein from the laws of another people, the extent of that adoption is to be strictly construed and not enlarged by implication. So far as its laws can be understood only by reference to foreign law, that reference is authorized by the lawmaker, because it is necessary; but so far as its commands may be understood as original terms, and without such reference, they must be construed independently. It is only when understood to be, to this extent, the original expression of its own will that its words can communicate to its own people the whole and self-sufficient force of that will. To assume, without plain necessity, that it utters the intention of an alien law, is to ignore to just that extent its absolute independence of existence and action and will.

By the argument which is made here by the managers as to the proper way to construe our Constitution by referring to English precedents and customs as they stood when our Constitution was formed, Charles J. Guiteau would have gone unwhipped of justice, for he could not have been punished either in the District of Columbia or the State of New Jersey, for such was the state of English decisions, strange as it may seem, at the time we separated from the mother country.

But what of it? I say that if we go back to English precedents you will find the situation to be precisely the same as we claim it is here under the plain language of our Constitution. You may not go back to the days when it was forbidden for a man on trial before the House of Lords to have counsel in his defense, when he was not permitted to testify; and when after he had been convicted he was not merely to be removed from office, but if the House of Lords chose he could be taken to the block and he could be disembowled and his bowels held before his face before he was dead. I do not understand that the managers expect us to go back to those days to find precedents to govern your decision.

And if you will take the later cases you will find that the doctrine is laid down exactly as we are seeking to lay it down here, that if you want to punish a civil officer for a crime against the law you may impeach him, but for anything else you must seek the remedy by address. Even as far back as 1724, in the case of the Earl of Macclesfield, reported in Howell's State Trials, you will find the whole contention from the beginning to the end in that case was whether the things which the Earl of Macclesfield was charged with doing were crimes. The managers labored, and successfully labored, to show that what he was charged with doing was an offense at the common law and was an offense under certain statutes which they cited.

The case of Warren Hastings, of course, must be adverted to in this connection. I have seen it claimed by some that what he was charged with did not amount to crimes. In other equally able and important statements by learned writers it has been shown that his alleged offenses clearly did amount to crimes. But what matters it? I do not understand, as the managers seem to, that when you find that a person has been charged in a court with a certain offense that that is a decision that that thing is a criminal offense. I do not understand that merely because a man has been charged in articles of impeachment with doing certain things that alone determines that those things are impeachable offenses. You look to the action of the court, and when you find a case in the later days in England, in the last century before we separated from her, or in the United States, where a man was charged in an article of impeachment with doing something that was not a crime against positive law and was convicted, then you will have a precedent which you can cite here against us; but you can find no such. In the case of Warren Hastings, which, as we all know, dragged along, being heard from time to time for seven years, so long that a great many of the members had gone out of the House or had not heard enough of the evidence to justify them in voting, out of the large body of the House of Lords only 29 members voted, and the worst vote against Mr. Hastings on any article was 6 for conviction and 23 not guilty. So if that case decides anything it decides that what he was charged with was not a crime.

But most important of all is the case of Lord Melville, in 29 Howell's State Trials, page 1417, the last impeachment trial in England, which occurred in 1806. In that case Lord Melville had been the treasurer of the navy, or he had been in such a position that he handled the public funds belonging to the navy of Great Britain, and some alleged misuse of those moneys formed the basis of the charge against him in the several articles of the impeachment. It appeared that he had taken the money out of the treasury and deposited it in some private place. His claim was that he did that merely for convenience, not with the intent of converting the money to his own use. The question was, Did that amount to a criminal offense? The House of Lords referred that question to the law Lords, who gave their opinion, as you will find at the page I have referred to, saying that the things charged did not constitute indictable offenses, and thereupon Lord Melville was promptly acquitted.

Now, Senators, what has taken place in this country in this regard is no less conclusive. The case of Senator Blount in 1798 is referred to. You can not tell anything about what the judgment of the court in that case would have been upon the merits, because he had been expelled from the Senate; and when the articles of impeachment were presented he made no reply to the merits at all, but counsel said, "You can not impeach a Senator, and, besides, he is out of office." Upon that double plea the Senate voted—14 to 11—that it set forth a good defense, and there were no further proceedings in the case.

Then came the case of John Pickering, by which one of the learned managers—Mr. Manager HOWLAND—this morning had some pleasantries at my expense, in which there were three articles of impeachment, two charging him in the performance of his duties upon the bench in a prize case involving the question of the custody of a certain vessel of deliberately, by his orders in the court, violating acts of Congress prescribing his duties as a judge. Of course, that was a criminal offense. But the thing which was in the mind of Mr. Manager HOWLAND is this: He said that in the opening statement I made here I said intoxication was a crime. I said nothing of the kind. If my friend will turn to the opening statement he will find that he is greatly mistaken. I said that when a man becomes intoxicated in a public place and acts in a disorderly manner it is a well-known crime everywhere in the United States and in every civilized country, I suppose, on the globe. The charge was first as a preamble that Judge Pickering was in the habit of getting intoxicated, and then that he had gone upon the bench in a drunken and intoxicated condition and deported himself in an unseemly manner and had there, in open court, used the name of the Divine Being profanely.

You may go down to our police court or any police court in the land and you will find a large portion of the cases are for drunk and disorderly conduct. Of course, that would not ordinarily be considered an indictable offense, or that even a Federal judge could be turned out of office if once in a while he happened to get on a slight spree. Yet it is a high misdemeanor within the very terms of the provision of the Constitution when a judge goes into court in a drunken condition and there uses the name of God in vain or otherwise conducts himself in an indecent manner. I beg the pardon of the Chair for even supposing such an illustration; but what would you say if a Senator who happened to be presiding in this body would come here, and when the proceedings are opened take his seat in the Presiding Officer's chair, drunk, unable to conduct himself in a seemly manner, and swear and curse in the face of the public here? Would anybody say that that is not an offense for which he might be taken down to the police court and punished?

Then comes the case of Samuel Chase as to which one of the learned managers has followed what is said in the encyclopedia.

It is the first time in a case of this kind that anyone has asked the Senate to be governed by an encyclopedia or a dictionary. In the American and English Encyclopedia it is said that in one of these impeachment cases the counsel for the respondent first raised the defense that the offense must be an indictable one, but abandoned it. That reference could only be to the case of Judge Chase. I have all that was said by the counsel for Judge Chase in that trial upon that subject, every word of it from beginning to end, and I shall ask to have the privilege of incorporating that at this point in my remarks, and will not take up your time with reading it.

Mr. Hopkinson:

Misdemeanor is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words the legal signification; a misdemeanor, or a crime, for in their just and proper acceptation they are synonymous terms, is an act committed or omitted, in violation of a public law, either forbidding or commanding it. By this test let the conduct of the respondent be tried, and by it let him stand justified or condemned. * * * We have read, sir, in our younger days, and read with horror, of the Roman emperor who placed his edicts so high in the air that the keenest eye could not decipher them, and yet severely punished any breach of them. But the power claimed by the House of Representatives to make anything criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. (2 Chase's Trial, 13, 17.)

Luther Martin (who was a member of the convention of 1787 which framed our Constitution):

I shall now proceed in the inquiry, For what can the President, Vice President, or other civil officers, and consequently for what can a judge be impeached? And I shall contend that it must be for an indictable offense. The words of the Constitution are that "they shall be liable to impeachment for treason, bribery, or other high crimes and misdemeanors." There can be no doubt but that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by "high crimes and misdemeanors." What is the true meaning of the word "crime"? It is breach of some law which renders the person who violates it liable to punishment. There can be no crime committed where no such law is violated. * * * Nay, sir, I am ready to go further and say there may be instances of very high crimes and misdemeanors for which an officer ought not to be impeached and removed from office; the crimes ought to be such as relate to his office or which tend to cover the person who committed them with turpitude and infamy; such as to show there can be no dependence on that integrity and honor which will secure the performance of his official duties. (Ibid., 137, 139.)

Mr. Harper:

If the conviction of a judge on impeachment be not to depend on his guilt or innocence of some crime alleged against him, but on some reasons of state, policy, or expediency, which may be thought by the House of Representatives and two-thirds of the Senate to require his removal, I ask why the solemn mockery of articles alleging high crimes and misdemeanors, of a court regularly formed, of a judicial oath administered to the members, of the private examination of witnesses, and of a trial conducted in all the usual forms? Why not settle this question of expediency, as all other questions of expediency are settled, by reference to general political considerations, and in the usual mode of political discussion? No, Mr. President, this principle of the honorable managers, so novel and so alarming; this desperate expedient, resorted to as the last and only prop of a case, which the honorable gentlemen feel to be unsupported by law or evidence; this forlorn hope of the prosecution, pressed into its service after it was found that no offense against any law of the land could be proved, will not, can not avail. Everything by which we are surrounded informs us that we are in a court of law. Everything that we have been for three weeks employed in doing reminds us that we are engaged not in a mere inquiry into the fitness of an officer for the place which he holds, but in the trial of a criminal case on legal principles. And this great truth, so important to the liberties and happiness of this country, is fully established by the decisions of this honorable court in this case on questions of evidence; decisions by which this court has solemnly declared that it holds itself bound to those principles of law which govern tribunals in ordinary cases.

These decisions we accepted as a pledge and now rely on as an assurance that this cause will be determined on no newly discovered notions of political expediency, or state policy, but on the well-settled and well-known principles of law (pp. 206, 207, bracketed). * * * Thus we find that even in England, where the power of impeachment is subject to no expressed constitutional restriction and where abuses of that power for the purpose of party persecution and state policy have sometimes been committed and more frequently attempted, an impeachment has never been considered as a mere inquest of office, but always as a criminal prosecution, differing not in essentials from those which are carried on before the ordinary tribunals of justice and subject to the same rules of evidence and the same legal notions concerning crimes and punishments. * * * What, Mr. President, are offenses in the language of the Constitution and the laws? For a definition of the term "offense," in a constitutional sense, we must consult our law books and not the caprice or the varying opinions of popular leaders or popular assemblies. Those books tell us that the word "offense" means some violation of law. Whence it evidently follows that no officer of Government can be impeached unless he have committed some violation of the law, either statute or common. It is not necessary for me to contend that this offense must be an indictable offense.

I might safely admit the contrary, though I do not admit it; and there are reasons which appear to me unanswerable in favor of the opinion that no offense is impeachable unless it be also the proper subject of an indictment. But it is not necessary to go so far; and I can suppose cases where a judge ought to be impeached for acts which I am not prepared to declare indictable. Suppose, for instance, that a judge should constantly omit to hold court; or should habitually attend so short a time each day as to render it impossible to dispatch the business. It might be doubted whether an indictment would lie for those acts of omission, although I am inclined to think that it would. But I have no hesitation in saying that the judge in such a case ought to be impeached. And this comes within the principle for which I contend; for these acts of culpable omission are a plain and direct violation of the law, which commands him to hold courts a reasonable time for the dispatch of business; and of his oath which binds him to discharge faithfully and diligently the duties of his office. The honorable gentleman who opened the case on the part of the prosecution cited the case of habitual drunkenness and profane swearing on the part of a judge as an instance of an offense not indictable, and yet punishable by impeachment. But I deny this position. Habitual drunkenness in a judge and profane swearing in any person are indictable offenses, and if they were not, still they are violations of the law. I do not mean to say that there is a statute against drunkenness or profane swearing; but they are offenses against good morals, and as such are forbidden by the common law.

They are offenses in the sight of God and man, definite in their nature, capable of precise proof and of a clear defense. The honorable managers have cited a case decided in this court as an authority to prove that a man may be convicted on impeachment without having committed an offense. I mean the case of Judge Pickering. But that case does not support the position. The defendant there was charged with habitual drunkenness and gross misbehavior in court arising from this drunkenness. The defense set up was that the defendant was insane and that the instances adduced of intoxication and improper behavior proceeded from his insanity. On this point there was a contrariety of evidence. It is not for me to inquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge that his insanity proceeded from habitual drunkenness. This case, therefore, proves nothing further than that habitual drunkenness is an impeachable offense. * * * The great principle for which we contend and which is so strongly supported by the clause of the Constitution already cited, that an impeachment is a criminal prosecution and can not be maintained without the proof of some offense against the laws, pervades all the other provinces of the Constitution on the subject of impeachment. * * *

In every light, therefore, in which this great principle can be viewed, whether as a well-established doctrine of the Constitution, as the bulwark of personal safety and judicial independence, as a shield for the characters of those whose lot it may be to sit on a trial of impeachment; or as a solace to them under the necessity of pronouncing a fellow citizen guilty, it equally claims—and I can not doubt that it will receive—the sanction of this honorable court, by whose decision it will, I trust, be established, so far as hereafter to be brought into question, that an impeachment is not a mere inquiry—in the nature of an inquest of office, whether an officer be qualified for his place or whether some reason of policy or expediency may not demand his removal—but a criminal prosecution, for supporting which the proof of some willful violation of a known law of the land is to be indispensably required. * * *

And will this honorable body, sitting not in a legislative but a judicial capacity, be called on to make a law, and to make it for a particular case which has already occurred? What, sir, is the great definition between legislative and judicial functions? Is it not that the former is to make the law for future cases, and that the latter is to declare it as to cases which have already happened? Is it not one of the fundamental principles of our Constitution and an essential ingredient of free government that the legislative and judicial powers shall be kept distinct and separate? That the power of making a general law for future cases shall never be blended in the same hand with that of declaring and applying it to particular and present cases? Does not the union of these two powers in the same hands constitute the worst of despotism? What, sir, is the peculiar and distinguishing characteristic of despotism? It consists in this, sir: That a man may be punished for an act which when he did it was not forbidden by law. While, on the other hand, it is the essence of freedom that no act can be treated as a crime unless there were a precise law forbidding it at the time when it was done. (2 Chase's Trial, 251, 253, 254, 257, 264.)

In the answer which the counsel for Judge Chase prepared they specifically set up the defense that what he was charged with was not an indictable offense, and all through the discussion of the case his counsel over and over insisted upon that point. Mr. Harper, whose language was used by Mr. HOWLAND as indicating the opposite, closed the arguments that were made on that subject in behalf of Judge Chase with the statement that he could not be convicted unless he had violated a known and positive law of the land. What was done with Judge Chase? He was acquitted, a majority of the Senators voting for his acquittal.

Now, shall we say that when you take a man into a court of impeachment and a majority of the judges acquit him of the charge, that that is a decision by the court, that what he was charged with was an impeachable offense?

In the case of Peck, in which there was but a single article of impeachment, what he had done was to take and throw a lawyer into jail and disbar him for 18 months because the lawyer had presumed to criticize his opinion in a case in which the lawyer was counsel for the losing party. He sent him to jail for 24 hours, long enough I take it for a man of the standing of Mr. Lawless to disgrace him. He sent him to jail for 24 hours and suspended him from practice because he presumed to criticize the judge's opinion out of court. If it be not a criminal offense for a judge in the performance of his judicial functions without law or right to send a man to jail, then I do not know what you might consider a criminal offense.

But what was the defense that was made for Judge Peck? Mr. Wirt was his principal counsel and spoke three days in his behalf. You will find from the beginning to the end of his argument he contended that because Judge Peck believed he had a right to punish in that way for contempt he should not be convicted. As was suggested by my friend, Mr. Simpson, Mr. Buchanan, afterwards President of the United States, who was the chairman of the managers of the impeachment in that case, did what I might humbly suggest to the learned chairman of the managers in this case. When Judge Peck was acquitted

on the ground that if he did not have the right to punish Lawless in that way for contempt, he honestly believed he had that right and should not be impeached merely for committing an error, Mr. Buchanan went back to the House of Representatives, and the next day started legislation which resulted in what we have had upon our statute books ever since, that a judge of a Federal court shall not punish in a summary way for contempt for an offense committed out of the presence of the court.

I will not stop to say anything about the case of Judge Humphries. Judge Humphries made no defense, and of course nothing could be concluded where there was no adverse party. He was charged with joining the Confederacy and abandoning his court. It is needless to say anything more on that subject.

Now, I want to come to what it seems to me is the case which ought to be an end of this discussion in the Senate of the United States—the case of Andrew Johnson. He became President in the spring of 1865, after the assassination of Mr. Lincoln and almost immediately, as we all know, became involved in a war with Congress. For two long years and more there was a very unfortunate state of affairs here in which he was charging that Congress was an illegal body hanging on the verge of the Government, to use his words in a speech he made in Cleveland, Ohio, because it did not admit to membership in the House and Senate the representatives of the 10 States which had gone out in 1860 and 1861. Congress was passing laws over his veto over and over again, and there was a state of feeling between Congress on the one hand and the President on the other which never existed in this country before and, let us hope, will never exist again.

In that state of affairs the Judiciary Committee of the House had before it a resolution sent to it by the House directing it to inquire whether Andrew Johnson had committed offenses for which he should be impeached. Mr. Boutwell, of Massachusetts, then a Member of the House, was chairman of that committee, and on behalf of five of the nine members he made a report recommending impeachment. Mr. Wilson, of Iowa, one of the greatest lawyers who ever sat in that body, made a report concurred in by the other three members in which he opposed impeachment and recommended that the resolution favoring impeachment which the majority had reported should not be adopted, because, and only because, the offenses which were charged were not indictable under any law of the United States. He made that report which reviewed the whole subject, and it might perhaps be needless for me to say a word here on this question except to read it. It is already printed in our brief and will be found at the end of the first volume of the printed record in this case at pages 1074 to 1084.

The history of impeachment trials in England from the beginning with the origin of our Constitution and what took place in the constitutional convention and subsequent developments down to 1867 were all set forth at great length and with great ability.

In the House of Representatives, in which there was a three-fourths vote in favor of vetoing the bills of the President, a House in which three-fourths of the Members were violently opposed to the President, when those two reports came before it, Mr. Wilson moved to lay the resolution for impeachment on the table. That motion was carried by nearly a two-thirds vote. The majority had set forth 26 different things which they said the President had done for which he ought to be impeached, mostly what might be called political offenses, and the House determined that they would not favor the impeachment, much as they desired to get rid of the President, because he had not done anything which was indictable and therefore could not be impeached.

Some months before, in the spring of 1867, Congress as one of the things which it had done which enraged Johnson, had passed a tenure-of-office bill, long since repealed, by which they undertook to make it impossible for the President to remove officers without the consent of the Senate. There was a special provision in that bill, that while the President when the Senate was not in session might remove an officer, yet when the Senate came back in December, if it did not confirm that action, the removed officer should resume his office and should be allowed to keep it. In that same summer of 1867 President Johnson undertook to remove Edwin M. Stanton as Secretary of War and to appoint Lorenzo Thomas as Secretary ad interim. Congress was not in session; and he had the right to do that. Under that act, Gen. Grant became Secretary of War ad interim; but when Congress met the Senate refused to confirm the President's action, and Mr. Stanton immediately retook possession of the War Department. On the 21st day of February following, in defiance of the penal provision of the tenure-of-office act, President Johnson undertook to remove Mr. Stanton, and sent Lorenzo Thomas over to Stanton's office with a letter directing Stanton to surrender possession to Thomas. Stanton, as we all remember, refused to do it. The matter came before the House of Representatives, and the House at once impeached Mr. Johnson. Mr. Wilson, who had made the minority report, of which I spoke, which was adopted by the House, then said, "Now the President has committed an indictable offense; and let us impeach him."

It is true, as Mr. Manager HOWLAND said to-day, that in those articles of impeachment there was one which charged the President with having made certain declarations and speeches about Congress as to which there was a question whether he had committed an indictable offense. When it came to a vote here in the Senate, the Senate voted first upon the last article—article 13—which charged a violation of the tenure of office law, and there was a vote of 35 for convicting and 19 against, one vote less than was necessary in order to convict Mr. Johnson; and so he was acquitted.

The Senate then immediately adjourned for two weeks, in order that those who favored impeachment might consider what they could do. They came together here again on the 26th of May, 1868. What did they do? They voted upon article 2 and upon article 3, both of which charged distinctly a violation of the penal provisions of the tenure of office law. Having the same vote upon those two articles, the Senate then adjourned without day without voting upon the other articles at all.

Now, I say there is a formal adjudication of both Houses of Congress, and in as important a case as ever came before the Senate, that, in order to be impeachable, an offense must be indictable.

I need not remind the Senate of the able men who sat on that side of the Chamber presenting the views of the House and the great lawyers who sat over here presenting the views of the President, or the great men who sat in this Chamber at that time and voted upon one side or the other. It was my good fortune to be present during most of that trial, and I remember well particularly that Senator Sumner, who sat over in that part of the Chamber [indicating] and was one of the most active participants in favor of impeachment, could not conceal his impatience with the slow progress of events. He wanted all sorts of evidence to be let in; he wanted the President removed for political reasons; and he was the most disappointed man, perhaps, in this whole body when the impeachment failed. I have just read an article in the December Century Magazine by one of the two survivors of the Senate of that day, Senator Henderson, who voted against impeachment and who still lives in this city, wherein he states that Senator Sumner came to him not long before he died and said, "Henderson, I want to let you know that I was wrong about that impeachment matter and that you were right. I do not want you to say anything about this until after I am dead, but then I want you to make it known."

There have been two impeachment cases since that time, neither of which, it seems to me, in the slightest degree affects the question we have here. Mr. Belknap was charged with bribery—several clear, distinct, specific acts of receiving money in consideration of having made an appointment to office. No defense was made in his case, except that which finally prevailed, that, because anticipating he would be impeached, he went to President Grant and got the President to accept his resignation. I may have something more to say about that case in another part of this argument, but it has no relation to the subject I am discussing now, because it is clear that he was charged with indictable offenses.

In the Swayne case it is true that the counsel for Judge Swayne in presenting the law of that case used a brief which I understood the managers here to say they disowned. I do not so read anything that took place in that record. They had a brief there, which everybody knows was written by Mr. Hannis Taylor; and who Mr. Hannis Taylor is I need not explain to anybody in this Chamber. In that brief he simply took the position that because Judge Swayne was not charged with having done anything in the performance of his official duties, but that everything he was charged with was something outside of his duties in court, he could not be punished for that reason; and his counsel rested the case upon that proposition. As Judge Swayne was acquitted, I do not see how anybody can contend that the Senate held in that case that what Judge Swayne was charged with constituted an impeachable offense.

I do not recall that any of the managers have referred to this, but it has been referred to in the other cases and may be in the minds of many Members of this body, and I therefore

mention it. It has been said, If you are right about that, under what law are you to decide what is an indictable offense? Then it is said that the Supreme Court of the United States has decided that there are no common-law offenses against the United States, and that, therefore, when the Constitution was adopted and when the Government went into operation there were no penal laws; that as there was no penal statute passed for more than a year after the Government was started, no officer during that time could be impeached for any offense whatever. Now, I say that that is a fallacy; the whole argument is a fallacy and altogether wrong. The common law is in force in this tribunal except as changed by acts of Congress. When we come to see why it was that the Supreme Court held that there were no common-law offenses in the inferior courts of the United States, we see at once that the application of that decision to impeachment proceedings is entirely without foundation. I read from the first case in which that question was decided, in Hudson *v.* Goodwin (7 Cranch, p. 32):

> The powers of the General Government are made up of concessions from the several States; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may under their general powers constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution and of which the legislative power can not deprive it. All other courts created by the General Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the General Government will authorize them to confer.

So, you see, the Supreme Court merely held that the inferior courts of the United States, which were created by acts of Congress, would take such jurisdiction, and no more, as Congress chose to give them.

It so happened that when Congress created the original criminal court and the other courts in the District of Columbia, they did what might just as well have been done in 1790 as to all the Federal courts. When this District was ceded to the Government and Congress took possession, a law was passed on the 27th of February, 1801, which is still the organic law of the District of Columbia. In that statute they simply said that the laws of the State of Maryland (which included the common law) should remain in force in the District of Columbia until otherwise ordered by Congress.

Congress might have done that for all the Federal courts, but it did not choose to do so. It might do it to-day; but instead of that it has from time to time, as the need appeared for it, passed acts defining criminal offenses.

You perceive at once that this court to which I am speaking is on the same plane in that regard as the Supreme Court of the United States. You are not the creature of any act of Congress. You, like the Supreme Court, are created by the Constitution, and you have the same authority and power to determine what the laws were which existed at the time you were created as the Supreme Court would have to decide what were the laws which govern its proceedings under the provisions of the Constitution, giving it original jurisdiction as to certain classes of cases.

That brings me to another objection which has been made here and which has been often referred to in the textbooks which gentlemen seem to think are of importance here, but which, of course, are only based on the cases, and we have the cases. They say there are many evil acts a judge or other civil officer of the Government might do that are not indictable, and it would be very bad indeed to allow such officer to continue in office, as you would have to do if you decide that he can only be impeached for an indictable offense, this, that, and the other act not being indictable. You find that running all through the discussion of impeachment cases in past times, and especially in the textbooks.

There is an offense known to the common law as misconduct in office, and it reaches, so far as I have been able to discover, almost every one of the illustrations which have been referred to of various acts which it is said would not be indictable offenses, and yet should be impeachable offenses. It is asked, suppose a judge refuses to hold court; suppose he refuses to summon a jury? Well, if he does, he is guilty of misconduct in office. Let me read what the Supreme Court of the United States has said in one simple sentence on that subject. I read from the opinion in the case of South against Maryland, in 18th Howard, page 402:

> It is an undisputed principle of the common law that for a breach of a public duty an officer is punishable by indictment.

Let me give you an instance of what happened in this District, which sufficiently illustrates that subject without going any further. I refer to the case of Tyner against the United States, in 23 Appeals, D. C., 324, a case decided by our Court of Appeals a few years ago. Gen. Tyner had been Assistant Attorney General in charge of the legal work of the Post Office Department. He was indicted, charged with conspiring with a nephew of his to commit an offense against the United States, to wit: The offense of misconduct in office. What was that misconduct? It was his duty, among other things, to investigate charges that were made of the use of the mails for fraudulent purposes, and when he found that there was a case presented which justified action, to go to the Postmaster General and recommend the issuance of a fraud order. We all know, of course, what that means—to stop the use of the mails by fraudulent concerns. The charge was that in a number of cases he had before him evidence that the mails were being used for fraudulent purposes by a number of concerns, which were named in the indictment, which were called investment companies, and that he neglected his duty to go to the Postmaster General and ask for fraud orders in those cases. That indictment was demurred to, and it was claimed on the part of his counsel that that did not constitute an offense under section 5440 of the Revised Statutes. All that Tyner's counsel claimed was that, since there is no such offense as misconduct in office known to the other Federal courts throughout the country, it could not be applied in our local jurisdiction; but the Supreme Court held that, under the common law, the failure of Gen. Tyner, with the evidence before him that the mails were being used for fraudulent purposes by certain named concerns, to go to the Postmaster General and report that and ask for a fraud order was a crime under the common law, the crime known as misconduct in office. So the case went back to trial, and in due time Gen. Tyner was promptly acquitted by the jury. I am not going to take the time to go over the illustrations which have been given here and elsewhere, but if you will go over them you will find that almost without exception they come within that rule of misconduct in office by a public officer.

There is this curious thing about it: It has been suggested in some cases that the law is uncertain in that regard as to whether when a public officer—judge, President, Cabinet officer, or what not—commits an indictable offense against the laws of the United States he can be proceeded against by indictment before he is impeached; and it has been suggested that if he still be in office he must first be impeached. Of course, that makes no difference about the proposition for which we are contending, because the Constitution expressly says that after the officer has been impeached, convicted, and removed from office he shall nevertheless be subject to indictment and trial in the ordinary courts.

As against all that, what do we have suggested here. "Why," says Mr. Manager HOWLAND, "a man who is a civil officer may be impeached whenever the public welfare requires it." If any one of you thinks that the public welfare requires Judge Archbald to be removed, according to this contention you are to vote for his conviction on any particular article you please to select or on all of them, just as you may see fit, although there is no charge here that the public welfare requires him to be removed. And then, says Mr. Manager STERLING, "Each Senator fixes his own standard in that regard;" and, as Mr. Manager WEBB says, "Crimes and misdemeanors have no meaning;" and, as Mr. Manager WEBB said again, "That is, at your pleasure, Senators."

I stated that this was something without precedent, but there was one very bold man who stood in this Chamber some years ago and did the same thing, but he used plainer terms. In the Johnson impeachment trial, when Gen. Benjamin F. Butler was making the opening statement here to the Senate, he announced this doctrine in these words, "Senators, you are a law unto yourselves"; and it was in reply to that proclamation by Gen. Butler, who was bold enough to claim anything anywhere, that Mr. Benjamin R. Curtis, former Associate Justice of the Supreme Court of the United States, one of Mr. Johnson's counsel, uttered the words which Mr. Simpson read from the record in the Johnson case.

Now, I say, instead of that, if there is anything which you find here which Judge Archbald has done which is not indictable and impeachable which you think ought to be indictable and impeachable, do what was done in the Peck case; let the honorable chairman of the Judiciary Committee of this day do what the honorable chairman of the Judiciary Committee of 1831 did, go to the House, and the day after Judge Archbald is acquitted introduce a bill which shall provide that if any Federal judge shall at any time have any business transactions with

any person who shall be or shall be likely to be a litigant in his court he shall, let us say, be fined in the sum of a thousand dollars and imprisoned for not less than one year, or both.

If this theory of the managers is to be adopted, what becomes of the principle which is at the foundation of all criminal jurisdiction in every country which pretends to recognize law, and especially so in this country and under our Constitution. If a man is brought into court he is entitled to know with what he is charged, and, as I said a few moments ago, Judge Archbald is not charged with having done anything which is against the public welfare or for which Senators ought to put him out of office on general principles.

But if I do not misunderstand what is intimated here, whether it is expressly said or not, what you are called upon to do by these learned managers is this: You are to say, with respect to article 1, "I do not find that there is anything there which justifies convicting Judge Archbald," and so with the other articles. "yet he has done certain things and under certain conditions which I think render him unfit to be a Federal judge."

Now, I ask you, Senators, if it is intended to ask the Senate of the United States to disgrace a man, to put him out of his office, and perhaps cover him with a mantle of shame so that he may never hold any other office under the Government of the United States, whether it would not be fair to let his counsel know, when they come before you, what charge they are to meet. If that had been done in this case when we brought here the judges associated with this respondent on the bench for years, the lawyers who practiced before him year after year, the men who knew him from boyhood up, who could tell you what kind of a man he was, there would have been no ruling that that testimony should be excluded, because there is nothing of that kind before the Senate.

We wanted to let the Senate know what kind of a man Judge Archbald is, what kind of a judge he is, and to that end we had witnesses by the score who surrounded him and have known him for many years, and who respect him and love him, but their mouths were closed because there was no such charge made here.

Now after having closed our mouths and kept out that evidence, they say to you, "Judge Archbald is the kind of a man who ought to be removed from office on general principles," or on some idea of "a system." Just what is the theory I do not know, but I presume the learned chairman of the managers will inform us before the case comes to a close.

I ask Senators to remember, while they are dealing with a judge of the Circuit Court of the United States, temporarily assigned to the Commerce Court, they are dealing here with the rights of every civil officer of the Government. It is not a question of judges alone, but a question of the President and Vice President and Cabinet officers and of every officer of the United States, which I suppose includes every official whose appointment has to be confirmed by the Senate, if it does not include Senators and Members of the House.

I am not here to contend that there might not be some provision for putting out of office a President or a Vice President or a Cabinet officer or a judge who is for any reason incompetent to properly perform the duties of his office, but there is no such provision in the Constitution of the United States at present. We have had illustrations here of men who have become unfit for their office and who could not perform the duties of their offices. The case of Judge Pickering is the earliest one. In that case, as it was claimed, the respondent had become insane but the Senate removed him, not on that ground apparently, but because he had come into the court in a drunken condition and had there behaved in a disorderly and disgraceful manner.

But a man may be disqualified in other ways. Twice members of the Supreme Court of the United States have become absolutely disqualified for the performance of their duties. If an officer may be removed because he is not able for one reason to perform the duties of the office, he may be removed because he is so disabled for any other reason. Mr. Justice Hunt was paralyzed, and for that reason unable to attend to his judicial duties, or even to attend the court.

And so of Mr. Justice Moody, who was formerly Attorney General. He now lies upon a bed of pain and sickness with perhaps little expectation of ever getting up from it. Would you impeach him of high crimes and misdemeanors for being incapable of the performance of the duties of his office?

I certainly would aver that no Member of the House of Representatives would ever come here with such a contention, and if he did he would never get a vote in favor of the proposition that Mr. Justice Moody should be removed because he committed the high crime and misdemeanor of becoming incapable by reason of illness of performing his judicial duties. Instead of that you passed an act of Congress which allowed him to retire as though he had reached 70 years of age and had served 10 years upon the bench.

And let me remind you that you have in the case at bar a perfectly clear case of absence of any charge which relates to anything that has been done in the performance of the duties of the office which Judge Archbald holds. He is not charged with committing any crime. That is admitted. He is not charged even with doing anything wrong in connection with the duties of the office, crime or no crime.

Says Mr. Manager CLAYTON, at pages 889 and 890 of this record:

> We make no charge of any misbehavior in connection with official duties.

Says he again:

> We make no charges of partiality.

And at page 941 Mr. STERLING agrees with that proposition.

Now, Senators, as I have a few moments before the hour for adjournment, let me speak of something relating to the merits of this case, as I have said now all that I intend to say about the law, except as I may add a word to what my brother Simpson so well said upon the question of the last six articles.

Mr. Manager HOWLAND complains because we have raised an issue of law and an issue of fact in this case; that our first answer to each article of impeachment is that what is charged is not an impeachable offense; and that, in the second place, we proceed to confess and avoid—terms well known in lawyer's lingo. If he can find any case in the history of this country in which an issue of law of this character was submitted otherwise than at the end of the trial in an impeachment case, he can find some case that has not been referred to in this hearing and is not to be found in the books. In every case, instead of having a demurrer to the articles of impeachment considered, the whole matter has gone over to the final vote. Indeed, Mr. Manager Bingham in the Johnson impeachment trial contended that a demurrer to an article of impeachment had never been allowed.

Now, as to the defense here—and I am particular about this, because I think the Managers, and especially Mr. Manager HOWLAND, have unintentionally not fairly stated what is our defense on the facts. He says we confess and avoid. We do nothing of the kind.

These articles charge that Judge Archbald did certain things. In the first article it is charged that he had certain communications with officers of the Erie Railroad Co.; in the second article, that he saw Mr. Loomis, and so on. We admit these facts. And so as to the other articles. Then the article goes on to charge that the respondent did corruptly, unlawfully, and wrongfully use his judicial influence in those transactions. We deny that he used his judicial influence corruptly; we deny that he used it wrongfully; we deny that he used it unlawfully; and we deny that he used it at all.

I say now, at the conclusion of the evidence in this case, having come down to the time when the final vote is to be taken in this Chamber, if you take all the evidence that has been produced before you, it leaves this case just where it was when it started; that it is proved that Judge Archbald did the things which in his answer he admits he did, and it is not proved that in regard to any of them he used his judicial influence wrongfully, unlawfully, or corruptly, or that he used it at all.

The articles which I wish particularly to refer to are article 1, which refers to the Katydid dump transaction; article 3, which refers to what is known as the Packer No. 3 dump; article 6, which refers to a conversation between Judge Archbald and Mr. Warriner in reference to certain alleged favors for a Mr. Dainty—there is nothing of that kind in the article, but that is what we are now told it is intended to charge—and article 13, which is an attempt to gather up a number of things which are not specified.

That article charges, in the first place, that while Judge Archbald was district judge and circuit judge he entered into a scheme to raise money from litigants in his court by getting them to discount notes made by him or indorsed by him, and also entered into another scheme to get coal property from certain railroads, which are named, and other railroads not named which had litigation in the Commerce Court.

I intend in the discussion of those articles to take them up practically in their inverse order and discuss them in what I consider to be the order of their importance, as indicated by the amount of evidence which has been taken in regard to them.

About article 6 I shall say but a word, and that is this: The charge there is that Mr. Dainty—I am speaking now of the evi-

dence and not of what is in the article—came to Judge Archbald and mentioned the fact that the Everhart heirs, who have been referred to here so often, had outstanding claims against certain coal property of the Lehigh Valley Coal Co., and that it was desired that Judge Archbald should get that company through Mr. Warriner to purchase those interests of the Everhart heirs; that is, that they would get them in, the company being supposed to be very desirous of getting in these interests; and in consideration of that act of kindness to the coal company the respondent would ask it to lease a certain tract of land, called the Morris & Essex tract, to Mr. Dainty. The managers put upon the stand two witnesses to testify to that transaction; one of them was Mr. Dainty and the other Mr. Warriner. Each of them absolutely and positively denied the charge.

Mr. Warriner said that while Judge Archbald had spoken to him about the Everhart heirs' interest, as to which Judge Archbald was himself concerned, as we show here in reference to the Katydid matter, that he never connected that in any manner with the application that Mr. Dainty was to make for the lease to him of what was called the Morris & Essex tract. Mr. Warriner said that as the respondent was about to leave the office of Mr. Warriner he simply mentioned the fact that Mr. Dainty was going to make application, or had made application, for this lease for the Morris & Essex tract, and Mr. Warriner told him it was not to be leased. That was the end of it.

Mr. Dainty testified that in his conversation with the respondent no suggestion was made of a lease of the Morris & Essex tract as a consideration for the getting in of the Everhart interests, and he further says that he did not know whether the respondent did, in fact, see Mr. Warriner in regard to the matter.

Now, Senators, I call your attention to this remarkable fact: That after Mr. Dainty had been on the stand and declared most positively that there was no connection between those two matters, and after Mr. Warriner had been on the stand and testified that, according to his recollection, the two matters were never mentioned as having any relation to each other at all—so that by the testimony of the only two witnesses the managers produced on this point their whole claim was proven to be untrue—after that, when Judge Archbald came on the stand himself, after hearing the testimony of those witnesses and knowing that by no possibility could any other witness have personal knowledge on the subject, he said that, according to his recollection, he did tell Mr. Warriner that Mr. Dainty had suggested the leasing to him (Dainty) of the Morris & Essex tract in consideration of the services which he proposed to render the company in inducing the Everharts to convey their interests in other lands to the company.

Could there be a clearer illustration of the fact that you are dealing with an honest man? It is impossible to conceive that the respondent did not know when he took the stand and told that story that he was giving the only evidence in the case on which the managers could possibly rely to maintain their claim.

Assume that it is so. Assume now that Mr. Dainty did come to Judge Archbald and say, "Judge, I would very much like to get a lease of that Morris & Essex tract, which the coal company owns, and I can confer a great favor upon that railroad company by getting in the interests of these Everhart heirs. They have the interests of a lot of them. They have paid a hundred thousand dollars or so for certain portions of them, and these other people, I think, will convey their interests to them; and I will be willing to accomplish that for them if they will give me a lease in the other tract." If he did suggest that to Mr. Warriner and Mr. Warriner simply said, "We can not lease the Morris & Essex tract, but we will pay the Everhart heirs what we paid the others," and that was the end of the matter, it is impossible to see how that was a high crime or misdemeanor, or any kind of a crime or misdemeanor, or anything for which he could be reproved.

Mr. President, it is now within three minutes of 6 o'clock, and I should like to suspend the argument at this point.

The PRESIDENT pro tempore. The hour for adjournment of the Senate sitting as a court has so nearly arrived, only two minutes remaining, the Chair does not suppose counsel wish to occupy that time. What is the pleasure of the Senate?

Mr. ROOT. I move that the Senate sitting in the trial of the impeachment adjourn.

The motion was agreed to.

Mr. GALLINGER. I move that the Senate adjourn.

The motion was agreed to; and (at 5 o'clock and 59 minutes p. m.) the Senate adjourned until to-morrow, Friday, January 10, 1913, at 12 o'clock meridian.

HOUSE OF REPRESENTATIVES.

THURSDAY, *January 9, 1913.*

The House met at 12 o'clock noon.

The Chaplain, Rev. Henry N. Couden, D. D., offered the following prayer:

Father in heaven, quicken the good spirit within us that it may respond to the call for service. The opportunities are great, the call is insistent. We may none of us become heroes, but we pray that we may fulfill the common daily duties of life patiently, promptly, efficiently, without ostentation, that we may thus ennoble and glorify ourselves in Thee, through Jesus Christ our Lord. Amen.

The Journal of the proceedings of yesterday was read and approved.

COMMITTEE VACANCIES.

Mr. UNDERWOOD. Mr. Speaker, I desire to move the election of some gentlemen to fill vacancies on committees.

I first move that the gentleman from Ohio, Mr. TIMOTHY T. ANSBERRY, be elected to fill the vacancy now existing in the Committee on Ways and Means.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. L. L. MORGAN be elected to fill the vacancy in the Committee on Indian Affairs and also the vacancy in the Committee on Elections No. 3.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. A. C. HART be elected to fill the vacancy in the Committee on the District of Columbia.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. Mr. Speaker, I move that Mr. H. D. FLOOD be elected chairman of the Committee on Foreign Affairs.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. Mr. Speaker, I desire to inquire whether the gentleman from Virginia [Mr. FLOOD] has presented his resignation as chairman of the Committee on the Territories?

The SPEAKER. Yes; he presented it, and it was accepted.

Mr. UNDERWOOD. I therefore move that Mr. B. G. HUMPHREYS be elected chairman of the Committee on the Territories.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. Mr. Speaker, at the request of the minority leader, Mr. MANN, I desire to move that Mr. GEORGE C. SCOTT be elected to fill the vacancies in the Committee on Coinage, Weights, and Measures and the Committee on Reform in the Civil Service.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I also move that Mr. E. A. MERRITT, Jr., be elected to fill the vacancy in the Committee on Immigration and Naturalization and the vacancy in the Committee on Education.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. FRANK L. GREENE be elected to fill the vacancy in the Committee on Claims and the vacancy in the Committee on Pensions.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. L. C. DYER be elected to fill the vacancy in the Committee on Industrial Arts and Expositions.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. JOHN R. FARR be elected to fill the vacancy in the Committee on Mines and Mining.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. BURTON L. FRENCH be elected to fill the vacancy in the Committee on Elections No. 3.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. I move that Mr. WILLIAM S. VARE be elected to fill the vacancy in the Committee on Labor.

The SPEAKER. Is there any other nomination? If not, it is so ordered.

Mr. UNDERWOOD. That is all, Mr. Speaker.